No. 89-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

OWENS-CORNING FIBERGLAS CORPORATION, GAF CORPORATION, THE CELOTEX CORPORATION, CAREY CANADA, INC., EAGLE-PICHER INDUSTRIES, INC., ARMSTRONG WORLD INDUSTRIES, INC., KEENE CORPORATION, FIBREBOARD CORPORATION, OWENS-ILLINOIS, INC., UNITED STATES GYPSUM COMPANY, W.R. GRACE & COMPANY, NATIONAL GYPSUM COMPANY, U.S. MINERAL PRODUCTS CO., PFIZER INC., GEORGIA PACIFIC CORPORATION, H.K. PORTER COMPANY, INC., SOUTHERN TEXTILE CORPORATION, THE FLINTKOTE COMPANY, PITTSBURGH CORNING CORPORATION, TURNER & NEWALL, PLC, ASBESTOS CORPORATION, LTD., and PROKO INDUSTRIES, INC.,

Petitioners,

—v.—

THE DISTRICT OF COLUMBIA, A MUNICIPAL CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

PAUL A. ZEVNIK*
KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER
901 15th Street, N.W.
Washington, D.C. 20005
(202) 682-3500

Attorneys for Petitioners

* Counsel of Record

June 6, 1990

QUESTIONS PRESENTED

I. Whether the District of Columbia Court of Appeals exceeded its authority in implicitly overruling century-old precedent of this Court which holds that the District of Columbia is subject to statutes of limitations.

II. Whether Congress's exclusive legislative authority over the District of Columbia prevents the sovereign immunity doctrine of *nullum tempus* from operating in favor of the District, regardless of the manner in which the City's actions are characterized.

III. Whether the District of Columbia's lawsuit for alleged damage to its real property interests may be held to constitute a "public" function entitling the District to a form of governmental immunity where no evidentiary or other scrutiny was permitted into the nature of the District's activities, and where the court below *sua sponte* engaged in an extra-record foray into disputed issues of material fact.

IV. Whether rights of repose granted by Congress pursuant to its exclusive legislative authority over the District of Columbia, once vested, may be removed without due process.

LIST OF INTERESTED PARTIES

The following parties participated in the proceeding before the District of Columbia Court of Appeals:

The District of Columbia
GAF Corporation
United States Gypsum Corporation
Owens-Corning Fiberglas Corporation
Celotex Corporation
Carey Canada, Inc.
Eagle-Picher Industries
Armstrong World Industries
Keene Corporation
Fibreboard Corporation
Southern Textile Corporation
H.K. Porter Company
Owens-Illinois, Inc.
CertainTeed Corporation
W.R. Grace & Company
National Gypsum Company
U.S. Mineral Products Company
Pfizer Inc.
Georgia Pacific Corporation
Proko Industries, Inc.
The Flintkote Company
Raymark Industries, Inc.
Pittsburgh Corning Corporation
Turner and Newall, PLC
J.W. Roberts, Ltd.
Turner Asbestos Fibres, Ltd.
Asbestos Corporation, Ltd.

The following companies are subsidiaries of Owens-Corning Fiberglas Corporation:

American Borate Corporation
Ambarco, Inc.
Barbcorp, Inc.
Eric Company

Fiberglas Canada Inc.

V.I.L. Vermiculite Inc. (Canada) is a subsidiary of this company.

Karlcorp

Matcorp, Inc.

N.V. Owens-Corning S.A.

Deutsche Owens-Corning Glasswool GmbH (Germany), Owens-Corning Fiberglas Deutschland GmbH (Germany), and Owens-Corning Isolation France S.A. (France) are subsidiaries of this company.

OCFIBRAS Limitada

Fiberglas Fibras Limitada (Brazil) and Fiberglas Commercial Exportadora e Importadora Ltda. (Brazil) are subsidiaries of this company.

O/C/FIRST CORPORATION

OCFOGO, Inc.

OCFSC, Inc.

O/C/SECOND CORPORATION

O/C Tanks Corporation

Owens-Corning Cayman Limited

European Owens-Corning Fiberglas (Belgium) and Norsk Glassfiber A/S (Norway) are subsidiaries of this company, which also has a partnership interest in Arabian Fiberglass Insulation Company (Saudi Arabia).

Owens-Corning Fiberglas Espara, S.A.

Owens-Corning Fiberglas France, S.A.

Owens-Corning Fiberglas (Italy) S.A.

Owens-Corning Fiberglas Netherlands B.V.

Owens-Corning Fiberglas (U.K.), Ltd.

Owens-Corning Fiberglas (G.B.) Ltd. (U.K.), Regina Fibreglass Ltd. (U.K.), Wrexham A.R. Glass Ltd. (U.K.), and Scanglas, Ltd. (U.K.), are subsidiaries of this company.

Owens-Corning Real Estate Corporation

Palmetto Products, Inc.

Roscorp, Inc.

Scandinavian Glasfiber AB
  Dansk-Svensk Glasfiber A/S (Denmark) is a subsidiary of this company.
Veroc Technology A/S
Willcorp, Inc.

GAF Corporation has no parent and no subsidiaries (other than wholly-owned subsidiaries) aside from GAF-Huls Chemi GmbH, a 50% joint venture with Huls A.G.

The following are the parent and subsidiaries of the Celotex Corporation:

Jim Walters Corporation
Carey Canada, Inc.

Eagle-Picher Industries, Inc. has no subsidiaries or affiliates.

The following are affiliates and subsidiaries of Armstrong World Industries:

American Olean Tile Co., Inc.
Applied Color Systems, Inc.
Armstrong Cork Finance Corporation
Armstrong Ventures, Inc.
Armstrong World Industries Charitable Foundation
Armstrong World Industries (Delaware) Inc.
Charleswater Products, Inc.
Chemline Industries, Inc.
Design Ideas, Inc.
Forms + Surfaces, Inc.
  Bega/FS, Inc.
Thomasville Furniture Industries, Inc.
  Fayette Enterprises, Inc.
  Gilliam Furniture, Inc.
  Gordon's Inc.
  Westchester Ledather, Inc.

Keene Corporation is a wholly owned subsidiary of Bairnco Inc.

The following are subsidiaries and affiliates of Fibreboard Corporation:

Snider Lumber Products
Trimont Land Company

Owens-Illinois, Inc. is controlled by three limited partnerships of which an affiliate of Kohlberg, Kravis, Roberts & Co., L.P., is the general partner and certain investors associated with KKR. All subsidiaries are wholly owned, with the exception of a 50/50 joint venture with Nippon Electric Glass Co., Ltd., which operates under the name OI-NEG TV Products, Inc.

W.R. Grace & Company, which is now known as W.R. Grace & Company–Conn., is a wholly owned subsidiary of W.R. Grace & Company. The following are non-wholly owned subsidiaries of W.R. Grace & Company:

Del Taco Corporation
Del Taco Restaurants, Inc.
Grace Energy Corporation
Grace Drilling Company
Grace Environmental, Inc.

Aancor Holdings, Inc., is an affiliate of National Gypsum Corporation.

USG Corporation is the parent company of United States Gypsum Company. The following corporations are non-wholly owned affiliates of petitioner United States Gypsum Company:

American Metals Corporation
BHI International, Inc.
C-S-W Drywall Supply Company
C.N.G. Distribution Limited
CGC Inc.
CIKSA, S.A. de C.V.
Construcciones, Recubrimientos
Y Acabados S.A. de C.V.
DAP Canada

DAP Inc.
Darswan, Inc.
Donn Australia
Donn Canada Ltd.
Donn Far East SDN BHD
Donn France S.A.
Donn International, Inc.
Donn International Sales Corp.
Donn Pacific Ltd.
Donn Products (U.K.) Ltd.
Donn Products GmbH
Donn South Africa (Pty) Limited
Gypsum Communications Co.
Gypsum Energy Management Co.
Gypsum Transportation Ltd.
L & W Supply Corporation
Little Narrows Gypsum Co.
Marstrat, Inc.
North Baldwin Park Corp.
(formerly Hollytex)
101 South Wacker Co.
Panama Gypsum Company, Inc.
Panama Wallboard, Inc.
Sequoyah Carpet Corp.
Stocking Specialists, Inc.
USG Enterprises, Inc.
USG Foreign Investments, Ltd.
USG Foreign Sales Corp.
USG Industries, Inc.
USG Interiors, Inc.
USG International, Ltd. (DISC)
USG Properties, Inc.
United States Gypsum Export Company
Westbank Planting Company
Westlake Land (Canada) Ltd.
Windsor Shipping Limited
Yeso Mexicano S.A.
Yeso Panamericano, S.A. de C.V.
Yesomet, S.A. de C.V.

The following are subsidiaries and affiliates of U.S. Mineral Products Co.:

Cafco Products Limited (Canada)
Columbia Acoustics and Fireproofing Company
Cafco International, Ltd.
Isolatek Corporation

The following are non-wholly owned subsidiaries of Pfizer Inc.:

Laboratories Pfizer S.A.
Pfizer Laboratories (Bangladesh) Ltd.
Pfizer Egypt S.A.E.
Pfizer Limited (Ghana)
Agricare Limited
Pfizer Limited (India)
PT Pfizer Indonesia
Livestock Feeds Limited
Pfizer Products Limited
Pfizer Laboratories Limited
Pfizer Korea Limited
Pfizer Bioquimicos, S.A.
Pfizer Limited (Sri Lanka)
Pfizer C. & G. Inc.
Laboratorie Beral, S.A.
Quigley Italiana S.p.A.
SudFarma S.r.L.
Pfizer, S.A.
Pfizer Pharmaceuticals Ltd.
Pfizer Quigley Korea Ltd.
Dideco N.V.
Sofracob S.A.

The following are subsidiaries and affiliates of Georgia-Pacific Corporation:

Amador Central Railroad
Amazonias Compensados E. Laminados, Limitada
Ashley, Drew and Northern Railway Company

Aztec Trading Company, S.A. Incorporated
Beaver Wood Fibre Company, Limited
Brunswick Chemical Company
Brunswick Export Sales, Inc.
Brunswick Pulp and Paper Company
Brunswick Pulp Land Company, Inc.
Fordyce and Princeton R.R. Co.
G-P DISC, Inc.
G-P Inveresk Corporation
Georgia Steamship Company, Inc.
Georgia Temp, Inc.
Georgia-Pacific Building Materials Sales, Ltd.
Georgia-Pacific Finance N.V.
Georgia-Pacific Foreign Sales Corporation
Georgia-Pacific GmbH

Southern Textile Company is a wholly-owned subsidiary of H.K. Porter Company, Inc. The companies have no other subsidiaries or affiliates.

Inasco Limited is the ultimate owner of the Flintkote Company. Inasco Limited and its majority owned subsidiary Canada Trust Company are the only companies affiliated with the Flintkote Company as to which any debt or equity interest is held by anyone other than an affiliated company.

Each of Pittsburgh Plate Glass Industries, Inc., and Corning Glass Works holds 50% of the stock of Pittsburgh Corning Corporation.

T&N plc (formerly known and sued herein as Turner & Newall PLC) is an English company that has no parent and no United States subsidiary companies (other than wholly owned subsidiaries) except Chemopolymer Corporation. T&N's numerous subsidiaries (other than wholly-owned subsidiaries) outside the United States are as follows:

Asbestos Magnesia & Friction Materials Limited
Honel Holdings AG
Heinz Honnegger AG
Garnetco S.A.

T&N Holdings Limited
Ecsos Development Company Limited

Asbestos Corporation Limited has no parent or non-wholly owned subsidiary corporations.

Proko Industries, Inc. is a wholly owned subsidiary of RPM, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-____

OWENS-CORNING FIBERGLAS CORPORATION, GAF CORPORATION, THE CELOTEX CORPORATION, CAREY CANADA, INC., EAGLE-PICHER INDUSTRIES, INC., ARMSTRONG WORLD INDUSTRIES, INC., KEENE CORPORATION, FIBREBOARD CORPORATION, OWENS-ILLINOIS, INC., UNITED STATES GYPSUM COMPANY, W.R. GRACE & COMPANY, NATIONAL GYPSUM COMPANY, U.S. MINERAL PRODUCTS CO., PFIZER INC., GEORGIA PACIFIC CORPORATION, H.K. PORTER COMPANY, INC., SOUTHERN TEXTILE CORPORATION, THE FLINTKOTE COMPANY, PITTSBURGH CORNING CORPORATION, TURNER & NEWALL, PLC, ASBESTOS CORPORATION, LTD., and PROKO INDUSTRIES, INC.,

Petitioners,

—v.—

THE DISTRICT OF COLUMBIA, A MUNICIPAL CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

Petitioners hereby seek this Court's review, on a writ of certiorari, of the judgment entered in this case by the District of Columbia Court of Appeals.

OPINIONS BELOW

The opinion of the Court of Appeals below is reproduced in the Appendix to this petition at pp. 1a-32a. The opinions of the District of Columbia Superior Court in this case are reproduced in the Appendix to this petition at pp. 35a-55a.

JURISDICTION

The decision of the District of Columbia Court of Appeals was entered on August 24, 1989, and is reproduced in the Appendix to this petition. Petitioners' timely petition for rehearing and rehearing *en banc* was denied by the District of Columbia Court of Appeals on March 8, 1990. A copy of the court's order is reproduced in the Appendix hereto. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1257(a) and (b).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory provisions are involved: (1) United States Constitution, Article I, § 8, cl. 17; (2) United States Constitution, Amendment V; (3) United States Constitution, Amendment VII; (4) the District of Columbia Self-Government and Governmental Reorganization ("Home Rule") Act, D.C. Code §§ 1-201 *et seq.*; (5) D.C. Code § 12-301; (6) D.C. Code § 12-310; and (7) District of Columbia Law 6-202. The texts of these constitutional and statutory provisions are reproduced in the Appendix to this petition, pursuant to Rule 21.1(f) of this Court.

STATEMENT OF THE CASE

The District of Columbia, a municipal corporation created by Congress (the "District"), has sued petitioners for compensatory and punitive damages totaling $400 million for alleged damage to approximately 2,400 buildings owned or

operated by the District. App. 3a. The trial court granted motions for summary judgment and dismissed the District's claims as to the bulk of the buildings in the lawsuit, concluding that these claims were barred by the applicable statute of limitations and statute of repose enacted by Congress pursuant to its power "to exercise exclusive Legislation in all Cases whatsoever" over the District of Columbia. U.S. Const. art. I, § 8, cl. 17. In a lengthy opinion, a three judge panel of the District of Columbia Court of Appeals reversed the trial court's rulings, holding that the District is exempt from both the limitations and repose statutes under the common law doctrine of *nullum tempus occurrit regi* ("*nullum tempus*"), which grants to sovereigns immunity from the operation of limitations statutes. App. 5a, 20a. Petitioners seek review of the panel's decision.

I.

The District filed its complaint in this case on December 14, 1984. Through discovery, petitioners learned that the District had known of the factual predicates underlying its claims for years, but brought its lawsuit long after the three year statutory period had run. D.C. Code § 12-301. (App. 57a) In addition, discovery revealed that a majority of the improvements to real property involved in this action were completed long before the ten-year repose period created by Congress in its 1973 enactment of D.C. Code § 12-310. (App. 57a-58a)

In 1986, petitioners moved for partial summary judgment on statute of limitations and statute of repose grounds. After petitioners' first motion was filed, the Mayor hastily prepared legislation, Bill 6-510, which later became D.C. Act 6-261, seeking to exempt the District from the congressionally-enacted limitations and repose statutes. App. 59a. Bill 6-510 by its terms retroactively applied to all actions pending on or after July 1, 1986. App. 62a. Bill 6-510 was introduced, and later passed, pursuant to the District of Columbia Self-Government and Governmental Reorganization ("Home

Rule") Act, D.C. Code §§ 1-201 *et seq.* The Home Rule Act created no exemption or immunity on the part of the District of Columbia from D.C. Code § 12-301 or § 12-310. Nor did the Home Rule Act give the District government any authority to grant itself immunity from D.C. Code § 12-301 or § 12-310.

In a race to complete action on Bill 6-510 before an unfavorable ruling by the trial court,[1] the City Council used every procedural shortcut at its disposal to expedite passage of D.C. Law 6-202.[2] The new statutes of limitations and repose became effective on February 28, 1987.

II.

On February 3, 1987, the trial court granted petitioners' motions for summary judgment under the "old", congressionally-enacted statutes of limitations and repose. Applying this Court's holding in *Metropolitan Railroad Co.*

---

1 Corporation Counsel urged the Judiciary Committee of the City Council to enact the amendments promptly to "remove the [limitations] issue from any doubt," App. 50a, arguing that by expressly exempting the District from the operation of statutory time-bars "the Council would be reaffirming that the District has, since the enactment of the District of Columbia Self-Government and Governmental Reorganization Act, become more like a state than merely a municipal corporation in terms of its responsibilities and its authority." Comments of James R. Murphy, Acting Corporation Counsel, D.C., Before the Committee on the Judiciary Bill 6-510, the "District of Columbia Statute of Limitations Amendment Act of 1986" 2 (Oct. 15, 1986). During oral argument before the Court of Appeals, counsel for the District conceded that concern for the viability of this lawsuit was "the catalyst" for Bill 6-510.

2 No public hearings were held; the "consent agenda" procedure was used to dispense with public comment and a formal vote; and normal scheduling requirements were abandoned or waived so that approval would coincide with the hearing on petitioners' motions for summary judgment. App. 49a. The City Council approved the bill and sent it to the Mayor for signature. Final Council action on the bill took place on December 16, 1986, and the bill was signed by the Mayor on January 8, 1987. D.C. Act 6-261.

v. *District of Columbia*, 132 U.S. 1 (1889), the trial court held that "the statute of limitations applies to the District of Columbia." App. 35a. Finding no exemption for the District from the statute of repose, the trial court also barred claims for buildings substantially completed before January 17, 1970. App. 41a-42a.

After the "new" statutes of limitations and repose became law, the District moved for reconsideration in light of its self-created exemptions from operation of the statutes. After another round of briefing and oral argument, the trial court held that the amendments could not be applied retroactively to this case because to do so would deprive petitioners of due process and would contravene the separation-of-powers doctrine. The trial court also held that the District's unique dual status as litigant and law initiator made retroactive application of the new law "manifestly unjust" under *Bradley* v. *School Bd.*, 416 U.S. 696 (1974). App. 48a, 51a-52a. In the trial court's view, the District's use of legislation to modify the law for its own benefit in this case was fundamentally unfair:

> We have a situation where a major suit was filed in 1984 by the [District] government. It was faced with some troublesome motions filed in 1986, and then proceeded to do *what no other litigant can do*—it changed the rules in its favor after the battle had been joined.

App. 48a-49a (emphasis in original). "[T]o change the rules to be applied in this case" would be especially unfair, the trial court concluded, because the District was legislating "unabashedly in its own pecuniary self-interest." App. 51a.

The trial court certified for interlocutory review all rulings on the applicability of the statutes of limitations and repose under prior law and in light of the new post-"Home Rule" amendments.

III.

On August 24, 1989, the Court of Appeals reversed the trial court's decision, holding that the District enjoys *nullum tempus* immunity from the operation of limitations and repose statutes. App. 24a. The Court of Appeals specifically declined to reach or consider the constitutional infirmities posed by D.C. Law 6-202, namely the District's use of its legislative function to change the substantive law in the middle of major litigation which it brought. Rather, in an attempt to avoid the obvious due process and separation-of-powers difficulties presented by the District's new law, the Court of Appeals discovered a non-constitutional and non-statutory "common law" *nullum tempus* immunity on the part of the District of Columbia.[3]

The panel acknowledged in its opinion that *nullum tempus* is a common law doctrine that provides immunity to sovereigns, and that the issue in this case is whether the District is entitled to a privilege normally accorded only to the state governments—or, of course, to the United States. App. 12a-13a. The panel further acknowledged that under the Constitution, Congress—and not the District government—is the sovereign as to the District of Columbia, and that the District of Columbia does not enjoy the sovereign privileges and immunities granted by the Constitution to the States. App. 13a. The panel found it unnecessary, however, "to decide that the District has *all* the sovereignty of a state to conclude that it enjoys the protection of the *nullum tempus* doctrine." App. 18a (emphasis added). Nor did the panel apparently feel constrained by this Court's holding in *Metropolitan Railroad* that *nullum tempus* is "[t]he prerogative . . . of the sovereign alone." 132 U.S. at 11.

Instead, the panel purported to adopt a "functional rather than formalistic reading of the immunity issue." App. 21a. The panel held that the District enjoys *nullum tempus* immunity "when it brings suit to vindicate public rights and

---

3 The Court of Appeals did not reach any question concerning the effect of "Home Rule" on the constitutional propriety of D.C. Law 6-202.

involving the performance of public functions." App. 24a. The panel then found that because the District is responsible for the defense of the public interest and the public fisc in the District of Columbia, the District government is entitled to receive the benefit of Congress's *nullum tempus* immunity. App. 21a-23a. The panel did not address the fact that Congress retains legislative authority over the District and has not specifically delegated any kind of *nullum tempus* immunity to the District.

While acknowledging the holding of *Metropolitan Railroad*, the panel felt that the District should now be exempted from the operation of the statute of limitations when suing to vindicate "a right to protect an intrinsically sovereign interest or when exercising any right peculiarly that of a sovereign." App. 16a. The lower court engaged in no discussion or analysis of the constitutional or historical bases for the District's new-found sovereignty. Nor did it suggest any legal basis for in effect overruling this Court's century-old decision in *Metropolitan Railroad*.

The panel then proceeded to accept the District's declaration that it is suing to enforce a "public right in this case." App. 31a. While suggesting that "something more is required than a naked financial interest" in order to meet the public function requirement, App. 25a, the panel then ignored this principle and adopted the District's position that "[w]hen the government sues to recover from wrongdoers, it serves a public purpose . . . ." App. 29a-30a. Rather than remand the case to the trial court for findings regarding the nature of this suit, and the extent of any "public" rather than merely proprietary purpose served by the District's lawsuit—which is the only claimed "public" right involved here—the panel made a *sua sponte*, extra-record adjudication of material, contested facts, and determined that this case, in which the District is suing petitioners to recover money expended for remedying alleged property damage to buildings owned or leased by the District, serves a "public function." The panel did not even bother to analyze separately the effect of the new-found *nullum tempus* doctrine on the statute of repose. Instead, it blanketly applied *nullum tempus* to both the stat-

ute of limitations and the statute of repose, despite the fact that petitioners' substantive rights to repose have long since vested.

IV.

Petitioners timely sought rehearing or rehearing *en banc*, questioning the panel's *sua sponte*, extra-record investigation into the merits of the case, without opportunity for discovery or briefing by petitioners. Petitioners further argued that the panel erroneously construed the statute of repose as exempting the District, given that Congress enacted no such exemption, and given that petitioners' rights of repose had vested prior to enactment of the new legislation and prior to the Court of Appeals' decision. Petitioners also urged the court to decide the constitutional questions raised by D.C. Law 6-202. On March 8, 1990, petitioners' request for rehearing was denied. App. 33a-34a.

REASONS FOR GRANTING THE PETITION

Certiorari is warranted in this case for several interrelated reasons. First, the District of Columbia Court of Appeals improperly attempted to create its own rule exempting the District from operation of statutes of limitation and the statute of repose, a position rejected by *Metropolitan Railroad Co.* v. *District of Columbia*, 132 U.S. 1 (1889). The District of Columbia Court of Appeals has no authority to overturn decisions of this Court, and should not be permitted to do so.

Second, *Metropolitan Railroad* is founded not just on common law—as the Court of Appeals appears to have assumed—but also on the Constitution's grant to Congress of "exclusive" legislative authority over the District of Columbia. The District of Columbia possesses no inherent or common law sovereign privilege or immunity. Accordingly, *nullum tempus* immunity cannot be created by the District of Columbia Court of Appeals, or by the District of Columbia

itself under supposed "Home Rule" authority. The District's legal and sovereign status is a timely and important question presented squarely by this case. Certiorari is warranted to delineate the Constitution's grant of "exclusive" legislative authority over the District of Columbia, and, conversely, the limits of any inherent sovereign privilege or immunity enjoyed by the District.

Certiorari is also warranted because the Court of Appeals' mission to find a "public" purpose in the District of Columbia's action for damages to its real property interests improperly led the Court of Appeals to opine on disputed issues of material fact, without permitting an evidentiary inquiry or scrutiny of the District's assertions regarding its purpose in this litigation. In this case, given the transparent effort by the District to legislate away a defeat in this case—and to remove rights vested by the statute of repose—scrutiny of the City's self-proclaimed "purpose" in litigation is a matter of constitutional dimension.

I. The Lower Court's Decision Is In Direct Conflict with *Metropolitan Railroad Co.* v. *District of Columbia*, 132 U.S. 1 (1889).

Metropolitan Railroad Co. v. *District of Columbia*, 132 U.S. 1 (1889), holds that the District of Columbia statute of limitations runs against the City. 132 U.S. at 12. The conflict between *Metropolitan Railroad* and this case is patent. In *Metropolitan Railroad*, the District sought damages for the cost of repairing public streets. In terms of the District's purpose in preventing a loss to the treasury, in vindicating public rights to health and safety, and in wielding a congressionally mandated power, there is no material distinction between *Metropolitan Railroad* and this case.[4] This Court held that the City's claims in *Metropolitan Railroad* were time-barred.

---

4 In *Metropolitan Railroad*, the District claimed damages of more than $160,000, not an insubstantial sum for the early 1870s, when the District's claim arose. 132 U.S. at 2. In *Metropolitan Railroad*, the District claimed that it was seeking to enforce a public right. Supplemental Brief For The Defendant In Error at 13-14, Metropolitan R.R. v. District of Columbia, 132 U.S. 1 (1889).

Nothing has altered either the authority of this Court or its law as to statutes of limitations of the District of Columbia since 1889.[5]

The panel below sought to distinguish *Metropolitan Railroad* as follows:

> [T]he Court intimated that the right asserted in *Metropolitan Railroad* was not inherently sovereign, and that the District, being a municipality, lacked intrinsic sovereignty. However, it left open the question whether the District might be protected by *nullum tempus* when it did acquire a right to protect an intrinsically sovereign interest or when exercising any right which is peculiarly that of a sovereign.

App. 16a. No authority is cited for this proposition, and no reliance was placed on "Home Rule" legislation enacted since *Metropolitan Railroad*. At base, the reasoning of the Court of Appeals is impenetrable.

In fact, in *Metropolitan Railroad*, this Court reversed a decision of the District of Columbia Supreme Court, which had held that *nullum tempus* exempted the District from the statute of limitations. The lower court in *Metropolitan Railroad* accepted the District's argument that municipal corporations were not subject to statutes of limitations when enforcing "public" rights—the same reasoning advanced by the District and accepted by the Court of Appeals in this

---

5 The Court of Appeals itself has frequently recognized the supremacy of this Court on matters of District of Columbia local law. *See, e.g.*, Estep v. Construction Gen., Inc., 546 A.2d 376, 382 n.5 (D.C. 1988) ("the Supreme Court is the third and last forum after the Superior Court and this court . . . . The Supreme Court, therefore, may properly construe local law in contradiction to a holding of this court . . . ."); Dodson v. Washington Automated Co., 461 A.2d 1020, 1024 (D.C. 1983) ("[w]e believe Rodriguez [v. Compass Shipping Co., 451 U.S. 596 (1981)] is binding in the present dispute"). *Cf.* Meiggs v. Associated Builders, Inc., 545 A.2d 631 (D.C. 1988), (involving a matter adopted by the District of Columbia Council, not Congress), *cert. denied*, _____ U.S. _____, 109 S.Ct. 3178 (1989). Significantly, in Ward v. District of Columbia, 494 A.2d 666, 668 (D.C. 1985), the Court of Appeals acknowledged that this Court's decision in *Metropolitan Railroad* is "binding" precedent that it must follow.

case.[6] However, this Court soundly rejected that reasoning, finding that immunity is the prerogative of the sovereign alone. 132 U.S. at 11-12. Although this Court reserved for possible exception from its decision actions regarding "purprestures and public nuisances, by encroachments upon the highways and other public places," it made clear that this potential exception would apply, if at all, only to an offense "against the sovereign power itself." *Id.* at 12.

The lower court panel in this case purported to invoke this exception while incongruously asserting that it was unnecessary to reach the issue of sovereignty. App. 18a. It reasoned that, under a "functional" analysis, when a municipality performs a "public function," it enjoys immunity from the running of time.[7]

However, this Court has never altered its view that *nullum tempus* immunity applies *only* to sovereigns. *See, e.g., Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 132-35 (1938). The instant suit, initiated by a municipality, is in contract and in tort for damages. Here there is no alleged "offense against the sovereign power itself;" the District owns or leases the properties in question, and petitioners pose no impediment to the District's control over them. Notwithstanding the Court of Appeals' attempt to fabricate a broad

---

6 District of Columbia v. Washington & G. R.R., 1 Mackey 361 (1882). The District also pressed this line of reasoning on appeal to this Court in *Metropolitan Railroad*:

> This doctrine may be thus stated, that where a municipal corporation is seeking to enforce some right belonging to it in a private or proprietary sense it may be defeated by the statute of limitations; but where it is seeking to enforce a right in respect of which it represents the public or the State, or the right pertains to sovereignty, the statute has no application.

Supplemental Brief For Defendant In Error at 13-14, Metropolitan R.R. v. District of Columbia, 132 U.S. 1 (1889).

7 The District's efforts to secure immunity and to revive its causes of action were designed to relieve budgetary concerns rather than to address any alleged hazard to the public health. This effort is of doubtful constitutional validity. *Cf.* School Bd. v. United States Gypsum Co., 234 Va. 32, 360 S.E.2d 325, 329 (1987) (revival statute could not survive manufacturer's due process challenge, even under the state's police power).

"public function" exception to the *Metropolitan Railroad* rule, this suit, like *Metropolitan Railroad* itself, is nothing more than a belated action by the District to hold third parties responsible for the cost of work it has performed. It certainly is not a suit to vindicate any "offense against the sovereign power."

Metropolitan Railroad remains the law of the District, as determined by this Court while sitting in its capacity as the highest court of the District of Columbia.[8] The District of Columbia Court of Appeals cannot overrule *Metropolitan Railroad*, as this Court should make clear.[9] Review is therefore required.

---

8 In 1889, this Court was the sole appellate court hearing cases brought initially in the District of Columbia's Supreme Court. This Court heard cases from the District of Columbia Supreme Court on writs of error. *See, e.g., Metropolitan Railroad, supra*; Stanton v. Embry, 93 U.S. 548 (1876). This Court was thus the arbiter of District of Columbia law at the time of *Metropolitan Railroad*. Although this Court's appellate review of District of Columbia court decisions has changed variously since 1889, *compare* 27 Stat. 434 (1893) *and* D.C. Code § 11-101 *et seq.* (1940) *with* D.C. Code § 11-101 *et seq.* (1981), none of these changes, or other changes in the judicial systems operating in the District, diminishes the precedential value of *Metropolitan Railroad*. Indeed, the distinct circumstances affecting this Court's jurisdiction over District of Columbia local law in 1889 serve only to underscore the binding effect of *Metropolitan Railroad* on the District of Columbia Court of Appeals. While the precise congeries of law and history affecting this case may not recur frequently, certainly no body other than this Court is in a position to grapple with the unique issues presented by this case.

9 Although this Court has recognized that it may be appropriate to defer to decisions of the Court of Appeals in certain matters involving purely local law, Pernell v. Southall Realty, 416 U.S. 363 (1974), it never has held that the Court of Appeals is free to overturn prior binding decisions of this Court. The statutory provisions at issue in this case were enacted by Congress for the District of Columbia. Acts of Congress affecting only the District of Columbia, like other federal laws, "certainly come within this Court's Art. III jurisdiction." Whalen v. United States, 445 U.S. 684, 688 (1980). The deference accorded the Court of Appeals on matters of local law "is a matter of judicial policy, not a matter of judicial power," and this Court will exercise its jurisdiction over the District's courts to correct "egregious error" and where questions of general federal law "cannot be separated" from questions of local law. *See Whalen*, 445 U.S. at 688; Fisher v. United States, 328 U.S. 463, 476 (1946).

II. The Lower Court's Disregard of *Metropolitan Railroad* Derives From A Misperception of That Case's Constitutional Underpinnings and of the Legal Status of the District of Columbia, a Municipal Corporation.

Metropolitan Railroad is founded on the constitutional grant to Congress of the power "[t]o exercise exclusive Legislation in all Cases whatsoever" over the District of Columbia. U.S. Const. art. I, § 8, cl. 17. The Constitution's grant of "[e]xclusive legislative power is in essence complete sovereignty." *S.R.A., Inc.* v. *Minnesota*, 327 U.S. 558, 562 (1946). The District, at the time of *Metropolitan Railroad* as well as today, is merely "a body corporate for municipal purposes," with the right to "sue and be sued, plead and be impleaded," D.C. Code § 1-102, and is "subject to the ordinary rules that govern the law of procedure between private persons"—including the statutes of limitations and repose. *Metropolitan Railroad*, *supra*, at 9.

This conclusion is consistent with well-settled constitutional principles of sovereignty and governmental power. The Constitution allocates no power or sovereignty of any kind to the District of Columbia.[10] Sovereignty cannot be created by the common law. Sovereignty in the United States rests with the people, who govern through a written Constitution. *See*, *e.g.*, *Penhallow* v. *Doane's Adm'r*, 3 U.S. 54, 93-94 (1795). Unless provided for in the Constitution, sovereignty, and hence *nullum tempus* immunity, does not exist.[11]

---

10 Congress's 1973 "Home Rule" legislation does not affect this result. Unfortunately, the Court of Appeals failed to grapple with post-"Home Rule" D.C. Law 6-202 or its constitutional infirmities.

11 This Court has recognized on other occasions that all sovereign power within the territory of the United States resides either with

> the Government of the United States, or [with] the States of the Union. There exist within the broad range of sovereignty but these two. There may be cities, counties, and other organized bodies with limited legislative functions, but they are all derived from, or exist in, subordination to one or the other of these.

(footnote continued)

The Constitution allocates certain powers to Congress; all other powers are reserved to the states and the people. U.S. Const. amend. X. When the States of Maryland and Virginia ceded the areas that became the District of Columbia,[12] they relinquished their legislative power—and hence their sovereignty—over the District to Congress. U.S. Const. art. I, § 8, cl. 17. The District, therefore, has no sovereignty of its own, and has "adopted the whole body of Congress for its legitimate government." *Loughborough v. Blake*, 18 U.S. 317, 324 (1820).[13]

In the century following *Metropolitan Railroad*, Congress enacted a comprehensive statutory code pertaining specifically

---

United States v. Kagama, 118 U.S. 375, 379 (1886). Thus, "[w]e are a nation not of 'city-states' but of States." Community Communications Corp. v. City of Boulder, 455 U.S. 40, 54 (1982). The District, which is neither a part of the federal government nor a state of the union, is not entitled to any type of sovereign privilege or immunity.

12 The territory ceded to Congress by Virginia was returned by Act of Congress in 1846.

13 The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." It "states but a truism that all is retained which has not been surrendered." United States v. Darby, 312 U.S. 100, 124 (1941). Under the Constitution, the exclusive legislative power of the District, and its complete sovereignty, were surrendered to Congress. Nor did the District of Columbia Self-Government and Governmental Reorganization Act (the "Home Rule Act") alter the District's sovereign statutes. In the Home Rule Act, Congress also expressly reserved to itself the right to act as the District's legislature:

> Notwithstanding any other provision of this Act, the Congress of the United States reserves the right, at any time, to exercise its authority as legislature for the District, by enacting legislation for the District on any subject . . . , including legislation to amend or repeal any law in force in the District prior to or after enactment of this Act and any act passed by the Council.

D.C. Code § 1-206. *See also* D.C. Code § 1-201 (purpose of the Home Rule Act was to delegate certain legislative powers to the District government, "[s]ubject to the retention by Congress of the ultimate legislative authority over the nation's capital").

to the District of Columbia and addressing directly the question of immunity from limitations. Congress knew of the law settled by *Metropolitan Railroad*,[14] yet never took action to provide immunity for the District from the statutes of limitations or repose. If Congress had intended to exempt the District generally from the statutes at issue in this case, it would have done so expressly,[15] as it has for the United States,[16] and in *specific instances*, for the District.[17]

Nor does the fact that Congress has delegated to the District the power to perform certain "public functions" provide the District with implicit immunity from the statutes of limitations and repose, as the panel below held.[18] In *Metropolitan*

---

14 Congress, by an act of March 3, 1891 (26 Stat. 870), required the Metropolitan Railroad Co. to pay the judgment against it within 18 months, or lose its charter. Subsequently, the company sought and received an extension. 27 Stat. 399. By an act of August 2, 1894 (28 Stat. 218), Congress granted another extension, provided that the company consent to waive its statute of limitations defense and submit to a final resolution of the dispute by the District of Columbia Court of Appeals. *See* District of Columbia v. Metropolitan R.R., 8 App. D.C. 322 (1896) (awarding District $34,136.12, with interest).

15 It is appropriate "to assume that Congress legislated with care," and that if Congress had intended a certain result, "it would have said so expressly, and not left the matter to mere implication." Palmore v. United States, 411 U.S. 389, 395 (1973). Once Congress addresses a subject, even one previously governed by common law, "the task of the . . . courts is to interpret and apply statutory law, not to create common law." Northwest Airlines v. Transport Union of Am., 451 U.S. 77, 96 n.34 (1981).

16 "Sections 12-301, 12-302, 12-305, and 12-307 do not apply to an action in which the United States is the real and not merely the nominal plaintiff." D.C. Code § 12-308 (1989) (enacted December 23, 1963).

17 *See, e.g.*, D.C. Code § 7-515 (1989) (exempting District from limitations concerning claims arising out of construction of Fern and Varnum Streets and Eastern Avenue Viaducts) (enacted March 3, 1927); D.C. Code § 7-1415 (exemption dealing with construction of subways and viaducts).

18 The Court of Appeals itself observed on another occasion that it is not likely that the holding in *Metropolitan Railroad* is affected by changes in the status of the District effectuated by passage of the Home Rule Act. Ward

Railroad, this Court reviewed the short-lived nineteenth century version of "home rule" in the District and found that "subordinate legislative powers of municipal character which have been *or may be* lodged in the city corporation, or in the District corporation, do not make those bodies sovereign." 132 U.S. at 9 (emphasis added).[19]

And, of course, this Court has expressly rejected the notion that a sovereign's delegation of home rule to a municipality implies a delegation of sovereign immunities. *Community Communications Corp.* v. *City of Boulder*, 455 U.S. 40 (1982).

Granting certiorari to review the legal status of the District of Columbia is timely and a matter of constitutional significance. This case presents an opportunity for this Court to emphasize that sovereign powers and immunities cannot be created dehors the Constitution. It also presents this Court with a unique opportunity to make clear that the District's exercise of "Home Rule" authority must be accomplished within the constitutional confines of due process and separation of powers.

---

v. District of Columbia, 494 A.2d 666, 668 (D.C. 1985). It is telling that the decision below stretched to find such an implicit delegation of immunity, notwithstanding its own contrary precedent, rather than address the express immunity purportedly granted to the District by statute in 1987.

19 It has long been established that the District's municipal authorities have only that legislative authority which Congress has given them. Maryland & Dist. of Columbia Rifle & Pistol Ass'n v. Washington, 294 F. Supp. 1166 (D.D.C. 1969), *aff'd*, 442 F.2d 123 (D.C. Cir. 1971); Neild v. District of Columbia, 110 F.2d 246 (D.C. 1940). Moreover, "[l]egislative grants of power to municipal corporations are to be so strictly construed as to operate as a surrender of . . . sovereignty . . . no further than is expressly declared by the language thereof." Boise City Artesian Hot & Cold Water Co. v. Boise City, 123 F. 232 (9th Cir. 1903) (citing Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 36 U.S. 420 (1837)).

III. The Mere Declaration By The Government of a "Public" Purpose Cannot Be Sufficient To Preclude Evidentiary Consideration of Material Facts In Dispute or Judicial Scrutiny of the Activities Allegedly Constituting the "Public" Purpose.

Based on its own analysis, the disposition of this case by the District of Columbia Court of Appeals hinged on its determination that the District's lawsuit seeks to vindicate a "public" right. However, the factual predicate for determining the issue of "public" right was created *sua sponte* by the court without a factual record.

Decisions by this Court on the standards for summary judgment have restated the principle of Fed. R. Civ. P. 56(c)[20] that summary judgment shall only be granted where " 'the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' " *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). *See also Celotex Corp.* v. *Catrett*, 477 U.S. 317 (1986). The only factual materials upon which it is appropriate for a reviewing court to rely in ruling on a motion for summary judgment are materials of record in the court below.

The panel here improperly relied upon extra-record information—including contested and controversial scientific studies—to opine on material issues of disputed fact. In so doing, the court deprived petitioners of their right to have the factfinder decide the material factual issues in dispute. As this Court has held, "credibility determinations, the weight of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . ." *Liberty Lobby*, *supra*, 477 U.S. at 255. In this case, the factual question of whether the District's lawsuit seeks to vindicate a "public" right is potentially dispositive of the bulk of the City's claimed $400 million in damages.

---

20 The Supreme Court decisions cited herein interpret Fed. R. Civ. P. 56, from which D.C. Rule 56 is derived.

Where an important decision turns on questions of fact, due process demands a meaningful opportunity to confront adverse evidence. *Goldberg* v. *Kelly*, 397 U.S. 254, 269 (1970). The court's independent inquiry into the merits of the District's claims resulted in a "secret, one-sided determination of facts decisive of [petitioners'] rights" in this case. *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U.S. 123, 170 (1951) (Frankfurter, J., concurring). Secrecy, of course, is inimical to judicial truth-seeking, *id.* at 171, but it is doubly improper where, as here, the factual issues are highly controverted, material, and bear directly on one of the pivotal questions in the case. *Gonzales* v. *United States*, 348 U.S. 407, 413-14 (1955). *See also Pernell* v. *Southall Realty*, 416 U.S. 363 (1974) (lawsuits "cannot be resolved with due process of law unless both parties have had a fair opportunity to present their cases"); *Grannis* v. *Ordean*, 234 U.S. 385, 394 (1914); *West Ohio Gas Co.* v. *Public Utils. Comm'n (No. 1)*, 294 U.S. 63 (1935); *Morgan* v. *United States*, 304 U.S. 1, 22 (1938).

In short, the mere declaration by a governmental entity that it is engaging in a "public purpose" is insufficient to create a governmental immunity.

In addition, in this case, the Court of Appeals' reliance on extra-record materials in reaching its conclusion that the District is pursuing this action to enforce a "public" right also raises concerns with respect to the Seventh Amendment right to a jury trial.[21] As this Court has observed, the Seventh Amendment establishes a federal policy that requires issues of fact in civil actions to be determined by a jury. *Byrd* v. *Blue Ridge Rural Elec. Coop.*, 356 U.S. 525 (1958); *Slocum* v. *New York Life Ins. Co.*, 228 U.S. 364 (1913) (under the Seventh Amendment, "it is the province of the jury to hear the evidence and by their verdict to settle issues of fact"); *see also Hunt* v. *Bradshaw*, 251 F.2d 103, 108 (4th Cir. 1958)

---

21 The provisions of the Seventh Amendment are fully applicable to the District of Columbia's courts. Pernell v. Southall Realty, 416 U.S. 363, 370 (1974); Capital Traction Co. v. Hof, 174 U.S. 1 (1899); *see also* E.R.B. v. J.H.F., 496 A.2d 607 (D.C. 1985); Carithers v. District of Columbia, 326 A.2d 798 (D.C. 1974).

("where there is a debatable issue of fact in the trial of a suit at common law in a court of the United States, the right to have it determined by a jury is guaranteed by the Seventh Amendment of the Constitution").

The Court of Appeals' consideration of evidence not contained in the record demonstrates a significant departure from the accepted and usual course of judicial proceedings and warrants review by this Court. *See, e.g., New York City Transit Auth.* v. *Beazer*, 440 U.S. 568, 568-569 (1979) ("[t]he departure by those courts from the procedure normally followed in addressing statutory and constitutional questions in the same case, as well as concern that the merits of these important questions had been decided erroneously, led us to grant certiorari"); *McNabb* v. *United States*, 318 U.S. 332 (1943).

IV. Rights Vested By the Congressionally-Enacted District of Columbia Statute of Repose May Not Be Removed Absent Due Process.

The lower court impermissibly deprived petitioners of a vested right to immunity from suit afforded them by an Act of Congress.[22] The District of Columbia statute of repose is not merely a statute of limitations that bars a party's remedy if an action is not timely filed. *Sandoe* v. *Lefta Assocs.*, 599 A.2d 732, 736 n.5 (D.C. 1988). Instead, it affords immunity from suit, a right of repose which "prevent[s] what might otherwise be a cause of action, from ever arising." *President of Georgetown College* v. *Madden*, 505 Supp. 557, 573 (D. Md. 1980), *aff'd in part, dismissed in part*, 660 F.2d 91 (4th Cir. 1981). The District's statute of repose was explained in *Madden, supra*:

---

22 This Court has jurisdiction to review decisions of the Court of Appeals concerning matters of statutory construction of the D.C. Code ("Acts of Congress applicable only within the District of Columbia") where a constitutional claim cannot be separated entirely from a resolution of the question of statutory construction. *See* Whalen v. United States, 445 U.S. 684, 687-88 (1980).

> [I]njury occurring more than ten years after the negligent act responsible for the harm, forms no basis for recovery. The injured party literally has *no* cause of action. The harm that has been done is *damnum absque injuria*—a wrong for which the law affords no redress. The function of the statute [of repose] is thus rather to define substantive rights than to alter or modify a remedy.

505 F. Supp. at 573, citing *Rosenberg* v. *Town of North Bergen*, 61 N.J. 190, 199-200, 293 A.2d 662, 666-67 (1972).

Other jurisdictions have recognized that the rights conferred by statutes of repose warrant constitutional protection where the rights have matured or become vested. The Supreme Court of Virginia, for example, recently held that Virginia's statute of repose operates against the Commonwealth despite Virginia's contention that it was immune under the *nullum tempus* doctrine. The court explained that "when a statute of repose has run on a tort claim, all causes of action are extinguished, 'creating a substantive right of repose in the potential defendants' which the legislature may not abridge." *Commonwealth* v. *Owens-Corning Fiberglas Corp.*, 238 Va. 595, 385 S.E.2d 865 (1989) citing *Roller* v. *Basic Constr. Co.*, 238 Va. 321, 384 S.E.2d 323 (1989). Most significantly, the court noted that "[t]he exemption from suit accorded those named in the statute [of repose] is a substantive right protected by the due process clause of the Constitution of Virginia . . . ." *Id.* (emphasis added).[23] *See also School Bd.* v. *United States Gypsum Co.*, 234 Va. 32, 360 S.E.2d 325 (1987).

Similarly, in *First United Methodist Church* v. *United States Gypsum Co.*, 882 F.2d 862 (4th Cir. 1989), *cert. denied*, ____ U.S. ____, 110 S.Ct. 1113 (1990), the United

---

23 In *Commonwealth* v. *Owens-Corning*, *supra*, the court dealt only with the due process clause of the Constitution of Virginia, Article I, Section II ("[N]o person shall be deprived of his life, liberty, or property without due process of law . . . ."). The court's analysis, however, is equally applicable and compelling under the due process clause of the United States Constitution.

States Court of Appeals for the Fourth Circuit, construing Maryland's statute of repose, explained:

> A statute of repose creates a substantive right in those protected to be free from liability after a legislatively determined period of time . . . . [Such statutes] are based on considerations of the economic best interests of the public as a whole and are substantive grants of immunity based on a legislative balance of the respective rights of potential plaintiffs and defendants struck by determining a time limit beyond which liability no longer exists.

Id. at 866. *See also Goad* v. *Celotex Corp.*, 831 F.2d 508 (4th Cir. 1987), *cert. denied*, 487 U.S. 1218 (1988). The rationale for this policy is that "[j]ust determinations of facts cannot be made when, because of the passage of time, the memories of witnesses have faded or evidence is lost." *Wilson* v. *Garcia*, 471 U.S. 261, 271 (1985); *see also United States* v. *Kubrick*, 444 U.S. 111 (1979) (statutes of repose "protect defendants and courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence . . . , fading memories, disappearance of documents, or otherwise").[24]

A vested right to an existing defense, like a vested right of action, is a property right protected by the due process clause of the Fifth Amendment. *See Pritchard* v. *Norton*, 106 U.S. 124, 132 (1882). Neither the statute of repose nor its legislative history suggests that Congress intended to exempt the District from its operation. The all-inclusive language of D.C. Code § 12-310 demonstrates that the statute was intended to apply to *all* buildings, including those owned or leased by the District.

---

24 The fundamental distinction between statutes of repose and statutes of limitations is particularly crucial in this case because the panel's decision turned on the application of *nullum tempus*. Because a statute of repose provides that, regardless of the plaintiff's diligence, a cause of action *never comes into being* if injury does not occur within a certain period of time, *nullum tempus*—which aims to preserve accrued public rights that otherwise would be lost due to the sovereign's negligence in belatedly filing suit—simply has no application.

The statute of repose applied in this case provided that "*any* action" to recover damages for injury resulting from a defective or unsafe condition "*shall be barred*" unless the injury occurs within ten years of the date of substantial completion or improvement thereto. D.C. Code § 12-310 (emphasis added). The Court of Appeals itself construed the phrase "any action" in the statute to mean literally *any* action, regardless of the parties to the dispute. *See J.H. Westerman Co.* v. *Fireman's Fund Ins. Co.*, 499 A.2d 116, 120 (D.C. 1985). The court also held that "when Congress sought to exclude a particular class from the operation of § 12-310, it did so expressly." *Id.*; *see also* Hearings before Subcommittee on Business, Commerce, and Judiciary, Senate Committee on the District of Columbia, 92d Cong., 1st Sess. (1972); *Block* v. *North Dakota ex rel. Bd. of Univ. & School Lands*, 461 U.S. 273, 290 (1983) (questioning the applicability of *nullum tempus* to a congressionally-imposed statute of limitations).

The panel below ignored the Court of Appeals' own construction of D.C. Code § 12-310 in favor of a contrary rule that treats the repose statute as a limitations statute subject to *nullum tempus* immunity. And, the lower court permitted vested rights to be removed by governmental action, despite the explicit act of Congress. Certiorari should be granted in order to consider the due process claims of petitioners.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM S. GARDNER
THOMAS J. O'BRIEN
MORGAN, LEWIS
& BOCKIUS
1800 M Street, N.W.
Washington, D.C. 20036
(202) 467-7000

Counsel for United States Gypsum Company

PAUL A. ZEVNIK*
PETER C. CONDRON
KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER
901 15th Street, N.W.
Washington, D.C. 20005
(202) 682-3500

Counsel for GAF Corporation

Of Counsel:

JOHN F. MAHONEY, JR.
MAHONEY, HOGAN,
HEFFLER & HEALD
777 14th Street, N.W.
Suite 600
Washington, D.C. 20005
(202) 347-6161

Counsel for Owens-Corning Fiberglas Corporation

DRAKE C. ZAHARRIS
PARKS, HANSEN & DITCH
Mercantile Towson Building
Suite 1012
409 Washington Avenue
Towson, Maryland 21204
(301) 821-6350

Counsel for The Celotex Corporation and Carey Canada, Inc.

RICHARD J. MCMILLAN
CROWELL & MORING
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2505
(202) 624-2500

Counsel for Eagle-Picher Industries, Inc.

KEVIN C. MCCORMICK
WHITEFORD, TAYLOR & PRESTON
Suite 1400
Seven St. Paul Street
Baltimore, Maryland 21202
(301) 347-8700

Counsel for Armstrong World Industries, Inc.

QUENTIN R. CORRIE
ANDERSON & QUINN
Suite 370
12450 Fair Lakes Circle
Fairfax, Virginia 22033
(703) 573-3520

Counsel for Keene Corporation

JOHN A. SUTHERLAND, JR.
SICILIANO, ELLIS, DYER & BOCCAROSSE
10521 Judicial Drive
Suite 300
Fairfax, Virginia 22030
(703) 385-6692

Counsel for Fibreboard Corporation

EDWARD J. LOPATA
DWIGHT D. MURRAY
JORDAN, COYNE, SAVITS & LOPATA
1030 15th Street, N.W.
Washington, D.C. 20005
(202) 371-1800

Counsel for W.R. Grace & Company

MICHAEL QUINN
CAHILL GORDON & REINDEL
1990 K Street, N.W.
Washington, D.C. 20006
(202) 862-8900

Counsel for W.R. Grace & Company

JOHN CALENDER
KATHRYN KUSSKE
CLIFFORD & WARNKE
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 828-4248

Counsel for Owens-Illinois Corporation

ARLENE FICKLER
HOYLE, MORRIS & KERR
1424 Chestnut Street
Philadelphia, Pennsylvania 19102
(215) 981-5700

Counsel for National Gypsum Company

CHARLES R. BRUTON
ROLIN P. BISSELL
SCHNADER, HARRISON, SEGAL & LEWIS
Suite 3600, 1600 Market Street
Philadelphia, Pennsylvania 19103
(215) 751-2686

Counsel for Pfizer Inc.

WILLIAM CLAGUE
LENNOX COOPER
BASTIAN, CLAGUE & CLANCY
4701 Sangamore Road
Bethesda, Maryland 20816
(301) 320-5500

Counsel for U.S. Mineral Products Company

THOMAS S. SCHAUFELBERGER
DRINKER, BIDDLE & REATH
901 15th Street, N.W.
Washington, D.C. 20005
(202) 842-8800

Counsel for Georgia-Pacific Corporation

NANCY E. GREGOR
GERTRUDE C. BARTEL
KRAMON & GRAHAM
Sun Life Building
Charles Center
Baltimore, Maryland 21201
(301) 752-6030

Counsel for H.K. Porter Company, Inc. and Southern Textile Corporation

STEVEN D. CUNDRA
ROCHELLE HINDMAN
THOMPSON, HINE & FLORY
1920 N Street, N.W.
Washington, D.C. 20036
(202) 331-8800

Counsel for The Flintkote Company

TIMOTHY J. BLOOMFIELD
DUNNELLS, DUVAL & PORTER
2100 Pennsylvania Avenue
Washington, D.C. 20037
(202) 861-1400

Counsel for Pittsburgh-Corning Corporation

WYATT B. DURRETTE, JR.
BRADLEY B. CAVEDO
DURRETTE, IRVIN & LEMONS, P.C.
600 Main Street
Twentieth Floor
Richmond, Virginia 23219
(804) 780-0505

Counsel for Turner & Newall, PLC

CHARLES E. GALLAGHER, JR.
O'MALLEY, MILES & HARRELL
99 Commerce Place
P.O. Box 900
Upper Marlboro, Maryland 20773
(301) 350-1300

Counsel for Asbestos Corporation Limited

BRYAN KENNEY
JAMES R. EYLER
MILES & STOCKBRIDGE
10 Light Street
Baltimore, Maryland 21202

Counsel for Proko Industries, Inc.

Counsel for Petitioners

June 6, 1990

* Counsel of Record

APPENDIX

Appendix

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 87-1254

DISTRICT OF COLUMBIA,

Appellant,

—v.—

OWENS-CORNING FIBERGLAS CORPORATION, ET AL.,

Appellees.

Appeal from the Superior Court
of the District of Columbia
(Hon. Peter W. Wolf, Trial Judge)

(Argued March 1, 1989 Decided August 24, 1989)

Lutz Alexander Prager, Assistant Deputy Corporation Counsel, with whom *Frederick D. Cooke, Jr.*, Corporation Counsel, and *Charles L. Reischel*, Deputy Corporation Counsel, were on the brief, for appellant.

Paul A. Zevnik, for appellee GAF Corporation, with whom *Andrew A. Cohen* and *L. Elise Dieterich*, for appellee GAF Corporation, and *William S. Gardner*, *Thomas J. O'Brien*, and *Michel Y. Horton*, for appellee United States Gypsum Company, were on the brief.

John F. Mahoney, Jr., entered an appearance for appellee Owens-Corning Fiberglas Corporation.

Chris Russo entered an appearance for appellees Celotex Corporation and Carey Canada, Inc.

Richard McMillan, Jr., entered an appearance for appellee Eagle-Picher Industries.

Kevin McCormick entered an appearance for appellee Armstrong World Industries.

Quentin R. Corrie entered an appearance for appellee Keene Corporation.

Edgar A. Sabanegh entered an appearance for appellee Fibreboard Corporation.

Andre Jay Graham and *Lee H. Ogburn* entered appearances for appellees Southern Textile Corporation and H.K. Porter Company.

John G. Calender entered an appearance for appellee Owens-Illinois, Inc.

Richard W. Boone and *Vicki J. Hunt* entered appearances for appellee CertainTeed Corporation.

Edward J. Lopata and *Dwight D. Murray* entered appearances for appellee W.R. Grace and Company.

John M. Bray and *Charles B. Wayne* entered appearances for appellee National Gypsum Company.

Patrick Mochu entered an appearance for appellee U.S. Mineral Products Company.

Charles R. Bruton and *Shelley Spencer* entered appearances for appellee Pfizer, Inc.

Theresa Hajost entered an appearance for appellee Georgia-Pacific Corporation.

Marianne Eby entered an appearance for appellee Proko Industries, Inc.

Steven D. Cundra and *Rochelle Hindman* entered appearances for appellee Flintkote Company.

John B. Isbister and *William W. Carrier* entered appearances for appellee Raymark Industries, Inc.

Stephen A. Bogorad entered an appearance for appellee Pittsburgh Corning Corporation.

Bradley B. Cavedo entered an appearance for appellees Turner and Newall PLC; J.W. Roberts, Ltd.; and Turner Asbestos Fibres, Ltd.

Kevin J. McCarthy and *Charles E. Gallagher* entered appearances for appellee Asbestos Corporation Ltd.

Before MACK, BELSON and TERRY, *Associate Judges.*

MACK, *Associate Judge*: The District of Columbia brought suit, sounding in tort, against thirty-seven miners, manufacturers, sellers and distributors of asbestos, a toxic substance until recently in common use in building construction, to recover removal costs and other damages associated with asbestos installation in roughly 2400 public buildings, including schools, libraries, hospitals, government offices, and public housing. The trial court granted summary judgment as to about eighty percent (80%) of the claims, holding them to be barred by the then-effective statute of limitations, D.C. Code § 12-301 (1981),[1] and statute of repose on building improvements, D.C. Code § 12-310 (1981).[2] The District contended,

---

1 D.C. Code § 12-301 was later amended by D.C. Law 6-202, 34 D.C. Reg. 527, 1885 (1987), *infra* note 3. Prior to amendment, it read in relevant part as follows:

§ 12-301. *Limitation of time for bringing actions.*

Except as otherwise specifically provided by law, actions for the following purposes may not be brought after the expiration of the period specified below from the time the right to maintain the action accrues:

• • •

(8) for which a limitation is not otherwise specially prescribed—3 years. . . .

2 D.C. Code § 12-310, also later modified by D.C. Law 6-202, *infra* note 3, read, prior to its amendment, as follows:

§ 12-310. *Actions arising out of death or injury caused by defective or unsafe improvements to real property.*

(a)(1) Except as provided in subsection (b), any action—

(A) to recover damages for—

(i) personal injury,

(ii) injury to real or personal property, or

(iii) wrongful death, resulting from the defective or unsafe condition of an improvement to real property, and

and contends on appeal, that it enjoys sovereign or municipal immunity from the running of the statutes of limitations and repose, particularly when suing in its governmental capacity to protect public safety or health.

Notwithstanding this contention, while the case was still pending, the Council of the District of Columbia passed legislation, D.C. Law 6-202,[3] specifically exempting the District

---

(B) for contribution or indemnity which is brought as a result of such injury or death, shall be barred unless in the case where injury is the basis of such action, such injury occurs within the ten-year period beginning on the date the improvement was substantially completed, or in the case where death is the basis of such action, either such death or the injury resulting in such death occurs within such ten-year period.

(2) For purposes of this subsection, an improvement to real property shall be considered substantially completed when—

(A) it is first used, or

(B) it is first available for use after having been completed in accordance with the contract or agreement covering the improvement, including any agreed changes to the contract or agreement, whichever occurs first.

(b) The limitation of actions prescribed in subsection (a) shall not apply to—

(1) any action based on a contract, express or implied, or

(2) any action brought against the person who, at the time the defective or unsafe condition of the improvement to real property caused injury or death, was the owner of or in actual possession or control of such real property.

3 34 D.C. Reg. 527, 1885 (1987) (codified at D.C. Code §§ 12-301, 12-310 (1989)).

D.C. Law 6-202 amends D.C. Code § 12-301 by (1) extending the statute of limitations "for the recovery of damages for an injury to real property from toxic substances including products containing asbestos" to "5 years from the date the injury is discovered or with reasonable diligence should have been discovered"; and (2) exempting the District of Columbia from application of the statute. It amends D.C. Code § 12-310(b) by adding subsections (3) and (4), which, respectively, prevent the statute of repose from applying to "any manufacturer or supplier of any equipment or machinery or other articles installed in a structure upon real property" and "any action brought by the District of Columbia government." Finally, it adds section 12-311 to the D.C. Code, which reads:

from these provisions. By its terms, the law applied retroactively to all cases pending as of July 1, 1986, and therefore to the instant case. However, as the legislation awaited expiration of the thirty-day congressional approval period before becoming effective, the trial court entered an order dismissing the claims now on appeal.

Before this court, the District argues that it enjoyed sovereign immunity by virtue of common law, or, in the alternative, by the effect of statute. Appellees contest both arguments. They argue that the District is a municipality unentitled to any of the incidents of sovereignty, and renew their contention that the retroactive legislation, passed for the very purpose of curing the District's defective immunity, violated due process principles and the separation of powers.

We conclude that the District of Columbia enjoys a common-law municipal immunity from the effects of the statutes of limitations and repose when suing in its municipal capacity to vindicate public rights. Because this ruling is ade-

---

§ 12-311. *Actions arising out of death or injury caused by exposure to asbestos.*

(a) In any civil action for injury or illness based upon exposure to asbestos, the time for the commencement of the action shall be the later of the following:

(1) Within one year after the date the plaintiff first suffered disability; or

(2) Within one year after the date the plaintiff either knew, or through the exercise of reasonable diligence should have known, that the disability was caused or contributed to by the exposure.

(b) "Disability" as used in subsection (a) of this section means the loss of time from work as a result of the exposure that precludes the performance of the employee's regular occupation.

(c) In an action for wrongful death of any plaintiff's decedent, based upon exposure to asbestos, the time for commencement of an action shall be the later of the following:

(1) Within one year from the date of the death of the plaintiff's decedent; or

(2) Within one year from the date the plaintiff first knew, or through the exercise of reasonable diligence should have known, that the death was caused or contributed to by the exposure.

quate to reinstate the claims dismissed by the trial court, we find it unnecessary to reach issues relating to the constitutional validity of D.C. Law 6-202.[4] We begin our analysis with a more detailed review of the nature of this litigation, including the interests at stake and procedural posture of the case. We then proceed to the merits.

I. BACKGROUND

A. *The Asbestos Hazard and Its Public Health Consequences*

"Asbestos" is the generic term for a group of naturally occurring hydrated magnesium or calcium silicate fibers consisting of "long, thin, rock crystals formed from old rock by metamorphism" and obtained by mining. H. POLLACK, MATERIALS SCIENCE AND METALLURGY 417 (3d ed. 1981); 4 L. GORDY & R. GRAY, ATTORNEYS' TEXTBOOK OF MEDICINE ¶ 134A.30 (3d ed. 1988). Because its long fibers can be dissolved, bonded, compacted, or spun into fire-, heat- and chemical-resistant materials, asbestos is easily manufactured into automobile linings, aircraft air ducts, fireproof gloves and clothing, insulating board, fireproof cloth, shingles, tiles, siding and pipe covering. H. POLLACK, *supra*, at 417. Under pressure, it may be molded with cement to produce asbestos board, or combined with sodium silicate to make thin paper sheets, useful to protect pipes, gaskets, and electrical wiring from fire or heat. Id. at 417-18. It may be bound with rubber to package chemicals, or with clay to insulate against high voltage. Id. at 418. Since the nineteenth century asbestos has also been widely used to insulate boilers, turbines, ovens, kilns, and other high-temperature equipment. P. BRODEUR,

---

4 We note, of course, notwithstanding any dispute about the constitutionality of D.C. Law 6-202 as retroactively applied, there appears to be no constitutional defect in its prospective application. Thus it is unlikely that the issue we decline to decide here will arise, respecting this law, in any future case.

OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL 11 (1985).

Because of its protective qualities and its versatility, asbestos has long been in wide use in a variety of settings. Consequently, large numbers of people have lived with, worked with, and been exposed to environments containing, asbestos. It has been incorporated into manufactured products such as protective clothing, containers and heavy equipment, and it has been used extensively as a fire-retardant in building construction. H. POLLACK, *supra*, at 417-18; L. GORDY & R. GRAY, *supra*, ¶¶ 134A.30, 134A.31. In efforts to prevent tragedies, builders have used asbestos in public facilities housing large numbers of workers, residents, visitors and other occupants, such as schools, hospitals, offices, and large-scale housing. *See* P. BRODEUR, *supra*, at 324. Further, hundreds of thousands of workers in the mining and manufacturing industries have worked directly with raw asbestos and asbestos products, exposing themselves unwittingly to extra-ordinary health hazards. *See generally id.*; *see* L. WHITE, HUMAN DEBRIS: THE INJURED WORKER IN AMERICA 15 (1983); W. HAMMER, OCCUPATIONAL SAFETY MANAGEMENT AND ENGINEERING 406 (3d ed. 1985).

The nature of these hazards has long been known. Greek and Roman chroniclers observed a sickness of the lungs in slaves who wove asbestos fabric. P. BRODEUR, *supra*, at 10. Modern knowledge of asbestos-related diseases dates back at least to the turn of the century, when Dr. H. Montague Murray, a British physician, discovered, in the autopsy of an asbestos textile worker, that the patient had suffered from severe pulmonary fibrosis, a degenerative disease of the lung tissue, and linked that condition to asbestos spicules found in the patient's lungs. *Id.* at 11. Since then, an increasing flow of medical literature has documented the incidence of lung diseases associated with exposure to asbestos.[5] Asbestos is

---

5 *See, e.g.*, Selikoff, Bader, Bader, Churg & Hammond, *Asbestosis and Neoplosia*, 42 AM. J. MED. 487 (1967); Dreessen, *A Study of Asbestosis*

highly friable, and upon disintegration, its particles float freely in the air, dusting skin and garments, and thus come to be handled and inhaled. Penetration of the skin can cause "asbestos warts." 4 L. GORDY & R. GRAY, *supra*, ¶ 134A.33. Much more serious diseases result from inhalation, including cancer of the lungs, bronchi, stomach and intestines; mesothelioma, a cancer of the chest wall (pleural mesothelioma) or abdominal cavity (peritoneal mesothelioma); and asbestosis, a fatally degenerative disease of the lung tissue involving heavy internal scarring.[6] *Id.*, ¶ 134A.34. Asbestos exposure is known to increase the risk of lung cancer five-fold, and in combination with heavy smoking, can multiply that risk 87 times. *Id.*, ¶ 134A.34 (3). Studies have shown that 40% to 53% of insulation and shipyard workers with substantial exposure to asbestos have died of asbestos-related diseases. *See* L. WHITE, *supra*, at 15. In a seminal study, the incidence of asbestosis in workers ten years after their first exposure was 10.4%; twenty years after, 44.1%; and forty years after, 94.2%. Selikoff, Churg & Hammond,

---

in the Asbestos Textile Industry, PUB. HEALTH BULL. No. 241 (U.S. Pub. Health Serv. 1938) Lanza, *Asbestosis*, 106 J.A.M.A. 368 (1936) Ellman, *Pneumoconiosis*, 14 BRIT. J. RADIOL. 361 (1934); Cooke, *Pulmonary Asbestosis*, 2 BRIT. MED. J. 1024 (1927); Cooke, *Fibrosis of the Lungs Due to the Inhalation of Asbestos Dust*, 2 BRIT. MED. J.147 (1924).

6 Sufferers of mesothelioma first experience pain at the site of the lesion, and may later develop a cough, calcification in the lungs, clubbing of the feet, increased girth, diminished appetite, anorexia, fluid retention in the abdominal cavity, thickening of the chest wall, and other symptoms. *Id.*, ¶ 134A.34 (2). Mesotheliomas only begin to appear fifteen or twenty years after the patient's first exposure to asbestos, are seen in greatest profusion ten years later, and are typically fatal within no more than two years of diagnosis. *Id.*

Asbestosis, a noncarcinomatous disease, is nevertheless fatal. Symptoms usually do not begin to appear until some fifteen years after exposure, when the patient begins to experience difficulty breathing after light exertion. *Id.*, ¶ 134A.34 (1). As the disease advances, the sufferer develops heart enlargement, anorexia, clubbing of the fingers, reduced lung elasticity and vital capacity, hyperventilation, and degeneration of the bronchi, among other symptoms. Id.; W. HAMMER, *supra*, at 406. Eventually, any physical exertion becomes "painful and exhausting." *See* L. WHITE, *supra*, at 46.

The Occurence of Asbestosis Among Industrial Workers, 132 ANN. NEW YORK ACAD. SCI. 139, 147 (1965).

It is impossible to appreciate fully the social costs of these diseases without approaching their most distinctive feature: asbestosis, mesotheliomas and other asbestos-related cancers can result from relatively minimal exposure in a variety of environments, and do not begin to appear until long after the exposure itself occurs.

> It has been found that persons who have been subjected to otherwise comparatively minor exposures can be affected. Workers employed for only a few days at plants where asbestos is used or even handled, although they did not process it, have been afflicted. Workers have inadvertently carried asbestos on their clothing to their families at home where members have sickened and died.

W. HAMMER, *supra*, at 406. "In the mind of the public, this is the most worrying and unsettling fact—have I already been exposed to a chemical that will kill me in 10 years time? The scientific community has no answer to this emotive question." H. CRONE, CHEMICALS AND SOCIETY: A GUIDE TO THE CHEMICAL AGE 169 (1986).

This impact has also been felt by industry and government. Litigation by those afflicted with asbestos-related diseases reached a watershed with the first major tort recovery, *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076 (5th Cir. 1973), and has already prompted the largest manufacturer, the Johns-Manville Corporation, to seek Chapter 11 bankruptcy protection from an estimated 50,000 tort claimants seeking more than $2 billion. *In re Johns-Manville Corp.*, 26 Bankr. 420 (S.D.N.Y. 1983); *see generally* Comment, *The Manville Bankruptcy: Treating Mass Tort Claims in Chapter 11 Proceedings*, 96 HARV. L. REV. 1121 (1983). Massive litigation has proceeded in many forums. The government has responded by designating asbestos a hazardous air pollutant[7]

---

7 *See* 40 C.F.R. § 61.01(a) (1988); 36 Fed. Reg. 5931 (1971).

and enacting extensive consumer product, occupational, and environmental regulations.[8]

It is evident that environmental contamination by asbestos poses a pervasive and lethal threat to public safety.

B. *Facts and Posture of this Litigation*

The District of Columbia initiated this suit on December 14, 1984, for damages resulting from the presence or suspected presence of asbestos-containing materials in 2407 properties on the master list of District-owned buildings. Having already expended some $ 4,401,793 on building inspection, the District reported in September 1986 that asbestos or asbestos-containing materials had been found in 17 of 20 public libraries and 171 of 188 public schools. Moreover, the District had contracted for further inspections which were planned or in progress at the 29 buildings of the District of Columbia General Hospital, 1181 buildings administered by the Department of Public Housing and Community Services, and 855 buildings administered by the Department of Public Works. Other structures affected included those belonging to the Fire Department and the Department of Corrections.

At the time the complaint was filed, the extent of the contamination was still not fully known. In an inspection of visible surfaces, five public schools were suspected of asbestos

---

8 *See* 16 C.F.R. § 1145.4 (1988) (placing consumer patching compounds containing respirable free-form asbestos within regulatory scope of Consumer Product Safety Act); 16 C.F.R. § 1145.5 (1988) (placing emberizing materials containing respirable free-form asbestos within scope of Consumer Product Safety Act); 16 C.F.R. §§ 1304.1-1304.5 (1988) (banning consumer patching compounds containing respirable free-form asbestos) 29 C.F.R. § 1910.1001 (1988) (establishing occupational safety standards relating to exposure to asbestos and other toxic substances); 29 C.F.R. § 1910.1101 (1988) (establishing interim standards regarding occupational exposure to asbestos until effective date of 29 C.F.R. § 1910.1001) 40 C.F.R. §§ 61.140-61.156 (1988) (establishing national emission standards for asbestos); 40 C.F.R. §§ 427.10-427.116 (1988) (limiting asbestos effluence from production of asbestos products), 40 C.F.R. §§ 763.91, 763.99 & App. B (1988) (providing for removal of asbestos-containing materials from schools).

contamination as early as 1977, and were cleaned up or otherwise made safe at the District's expense by December 1980. Techniques ranged from actual removal to encasing or covering up building components incorporating asbestos-containing materials. More discoveries ensued; asbestos was found in particularly dangerous places, such as ventilation ducts, air conditioning systems, and exposed surfaces. The District has compiled a limited record of asbestos inspection, abatement and removal. It has used its own funds and those appropriated by Congress to survey buildings and has appointed a special task force to accomplish the undertaking. It has used existing agencies, such as the Department of Environmental Services and the Public Schools Division of Safety and Security, to carry the task forward. Finally, as it has become aware that the scope of the problem is larger than its own instrumentalities can handle, it has contracted with private firms to conduct comprehensive environmental testing. However, limited public resources have made the prompt, comprehensive investigation and cleanup of the District's buildings impracticable. Building records reportedly fill 855 boxes containing 2500 pages apiece. Moreover, these records do not always reflect repairs, alterations, equipment replacements, or maintenance performed since construction. The mere survey of paperwork was expected to exceed a year in duration.

In the trial court, appellees contended that the District of Columbia long knew or should have known of the hazards underlying the litigation, and had even expended resources to remedy them. They argued that the statute of limitations barred any claim that the District failed to pursue within three years of discovering the hazard. Further, they contended that the statute of repose, barring any action to recover damages for injuries that occurred more than ten years after an improvement to real property and resulted from the defective or unsafe condition of the improvement, considered together with the three-year statute of limitations from the date a cause of action accrues, barred any claim resulting from improvements substantially completed before December 14, 1971—exactly thirteen years before the suit was

filed. Accordingly, appellees jointly moved for orders of partial summary judgment as to claims allegedly barred by the statutes of limitations and repose.[9] The trial court granted these motions in part. It held that the statute of limitations and statute of repose applied to the District of Columbia "notwithstanding the suit's obvious public interest." *District of Columbia v. Owens-Corning Fiberglas Corp.*, 115 D. Wash. L. Rptr. 1905, 1911 (Sept. 11, 1987). The effect of its orders was to eliminate some 1958 buildings from the scope of this litigation, better than 80% of the District's claims. The District's application for allowance of an interlocutory appeal under D.C. Code § 11-721(d) (1981) was granted by this court.

II. The District's Claim of Immunity From the Statutes of Limitations and Repose

A. *Introduction*

Unlike many other asbestos and toxic tort suits, the claims on appeal were not brought by an injured individual claimant or class, but by a government instrumentality seeking damages for the cost of preventing injury to others. This raises the distinct issue, not usually addressed in toxic tort cases, of a government's legitimate role in protecting the public, and the propriety of characterizing government spending on its own property as either a public or a private function. Here, however, it also raises the more immediate question whether the District government, because or in spite of its unique legal status, is entitled to a privilege accorded state governments but not ordinary litigants: immunity from the passage of time.

The District asserts that it enjoys sovereign immunity from the statute of limitations and statute of repose under a common-law principle called *nullum tempus occurrit regi*

---

9 Appellees also moved for and obtained summary judgment on a claim for breach of warranty. The order granting summary judgment on the breach of warranty claim has not been appealed.

("no time runs against the sovereign"). This doctrine has sometimes been invoked to defend the propriety of actions commenced by a state after a statute of limitations would ordinarily have run.[10] The District of Columbia, however, has never been admitted to the Union as a state. The District is, of course, a distinct jurisdiction and a governmental entity. For relevant purposes, it has been variously compared to or described as a state, territory, or municipality, and sometimes it has simply been called "unique."[11] Our question, therefore, is whether the government of the District is entitled to immunity in any of these capacities. We eschew deciding broader questions about the District's status because, following other jurisdictions, we are satisfied that it is entitled to limited immunity in its municipal capacity. This immunity encompasses the claims now on appeal. We therefore reach only the existence of the immunity and its applicability to the institutions bringing suit.

B. *The Doctrine of* Nullum Tempus *and Sovereign Immunity*

It is well settled that sovereigns enjoy a common-law immunity from the operation of statutes of limitations and repose. *See Guaranty Trust Co. v. United States*, 304 US. 196, 132 (1938). Like immunity from suit, the sovereign

---

10 *See, e.g., Twin City Fire Ins. Co. v. Bell*, 232 Kan. 813, 658 P.2d 1038 (1983); *Todd v. State*, 474 So.2d 430 (La. 1985); *Washington Suburban Sanitary Common v. Pride Homes, Inc.*, 291 Md. 537, 435 A.2d 796 (1981); *Port Auth. of N.Y. & N.J. v. Bosco*, 193 N.J. Super. 696, 475 A.2d 676 (1984); *State v. Tidmore*, 674 P.2d 14 (Okla. 1983); *Comm'r v. Rockland Constr. Co.*, 498 Pa. 531, 448 A.2d 1047 (1982); *Waller v. Sanchez*, 618 S.W.2d 407 (Tex. Civ. App. 1981).

11 *See Palmore v. United States*, 411 U.S. 389, 395-96 (1973) (District is a state for diversity purposes and its courts are treated as state courts, but its laws are not state laws); *Kawananakoa v. Polyblank*, 205 U.S. 349,353 (1907) (status of District comparable to that of a territory); *Metropolitan R.R. Co. v. District of Columbia*, 132 U.S. 1, 9 (1889) (District is "a separate political community," a municipality, and a state only in a qualified, non-constitutional sense); *Firemen's Ins. Co. of Washington, D.C. v. Washington*, 157 U.S. App. D.C. 320, 325, 483 F.2d 1323, 1328 (1973) (District is "a unique entity," "more akin to a state than to a municipality").

exemption from the running of time originated as a royal privilege, id., and perhaps survived the Revolution more by force of habit or precedent than by reason. *See United States v. Lee*, 106 U.S. 196, 207 (1882);[12] 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 25.01, at 436-37 (1958). Nevertheless, it was long and creditably argued, at least regarding sovereign immunity from suit, that the law could not be invoked against the lawgiver, and consequently, the privilege continued in the states. *Kawananakoa*, *supra* note 11, 205 U.S. at 353 (Holmes, J.).[13] Ultimately, it seems, the lone explanation of historical prerogative was unsatisfactory, perhaps because, in arbitrary fashion, it seemed to give the government a right that was withheld from the people. Especially as the legislatures and courts began limiting the scope of sovereign immunity from suit,[14] a more plausible justification for the parallel doctrine of *nullum tempus* seemed necessary if immunity from the effect of time was to continue. Therefore the Supreme Court explained in *Guaranty Trust*, *supra*, 304 U.S. at 132, that the rule expresses a legitimate public policy of preserving "public rights, revenues, and property from injury or loss, by the negligence of public officers. And although this is sometimes called a prerogative right, it is in fact nothing more than a reservation, or exception, introduced for the public benefit, and equally applicable to all governments." Id. (quoting *United States v. Hour*, 26 Fed. Cas. 329, 330 (C.C.D.Mass. 1821) (No. 15,373)). Thus, the policy of protecting the lawgiver was reunited with more democratic principles, for it was recognized that the people, as sovereign, are

---

12 The *Lee* Court observed that although sovereign immunity had "repeatedly been asserted here, the principle [had] never been discussed or the reasons for it given, but it [had] always been treated as an established doctrine." *Id.*

13 The *Kawananakoa* Court said, "[T]he answer has been public property since before the days of Hobbes. . . . [T]here can be no legal right as against the authority that makes the law on which the right depends." *Id.*

14 *See, e.g.*, Federal Tort Claims Act, ch. 753, 60 Stat. 812 (1946) (codified as amended at 28 U.S.C. §§ 1291, 1346, 1402, 2110, 2411-12, 2671-80 (1982 & Supp. IV 1986)); *Gray v. Bell*, 229 U.S. App. D.C. 176, 712 F.2d 490 (1983).

entitled to immunity from government functionaries' lax prosecution of public rights. Id.[15] The inherent limitation of this doctrine, of course, is that the rights protected must be of a public nature, and not merely the private or proprietary interests of particular institutions. *See District of Columbia v. Weiss*, 263 A.2d 638, 639 (D.C. 1970); *Stonewall Construction Co. v. McLaughlin*, 151 A.2d 535, 536 (D.C. 1959).

There is substantial authority for the application of the *nullum tempus* doctrine to actions brought by state government authorities. *See supra* note 10. The existence of the doctrine is not, and cannot be, in issue. Rather, the applicability of the doctrine to municipalities, and to the District of Columbia in particular, are debated in this case. The dispute boils down to a perceived conflict between the Supreme Court's disposition in *Metropolitan Railroad*, *supra* note 11, 132 U.S. at 22, and our own holdings in *Weiss*, *supra*, and *Stonewall Construction*, *supra*. In *Metropolitan Railroad* the District of Columbia sued a private company, which was under congressional charter to provide local transit service in the District and maintain the pavement adjacent to its trackbeds, for damages in the amount the District had expended to repair pavements defendant had failed to maintain. 132 U.S. at 2. The Court held the District's suit barred by the statute of limitations, reasoning that the District was "a municipal body merely," *Id.* at 3, having a right to sue and be sued according to the ordinary rules governing suits between private parties. *Id.* at 9. The Court further held that the sovereign power of the District was lodged in the federal government, not the District corporation. *Id.* Significantly, however, the Court reserved judgment as to whether a municipality could be time-barred from asserting a right where the alleged offense infringed on the sovereign power itself, and where the municipality had acquired a right in the interest protected by that sovereign power. *Id.* at 11. The Court explained:

---

15 As the Supreme Court explained in *Guaranty Trust*, "Regardless of the form of government and independently of the royal prerogative once thought sufficient to justify it, the rule is supportable now because its benefit and advantage extend to every citizen. . . ." 304 U.S. at 132.

> What may be the rule in regard to purprestures [wrongful enclosures of public spaces by private parties] and public nuisances, by encroachments on the highways and other public places, it is not necessary to determine. They are generally offenses against the sovereign power itself, and, as such, no length of time can protect them. Where the right of property in such places is vested in the municipality, an assertion of that right may or may not be subject to the law of limitations. We express no opinion on that point, since it may be affected by considerations which are not involved in the present case.

Id. Thus, the Court intimated that the right asserted in *Metropolitan Railroad* was not inherently sovereign, and that the District, being a municipality, lacked intrinsic sovereignty. However, it left open the question whether the District might be protected by *nullum tempus* when it did acquire a right to protect an intrinsically sovereign interest or when exercising any right which is peculiarly that of a sovereign. As discussed further below, we conclude that the immunities asserted by the District in this case are distinct from those asserted in *Metropolitan Railroad* in that they are not claimed as sovereign or quasi-sovereign privileges belonging intrinsically to the District government, but rather, solely in connection with public functions delegated to it to be performed in the posture of a municipality.

Facially, our decisions in *Weiss* and *Stonewall Construction* appear to contradict the Supreme Court's holding in *Metropolitan Railroad*. In *Weiss*, *supra*, 263 A.2d at 639-40, an action the District brought to compel appellee to pay for services at a public hospital, we held that the District could not be time-barred from asserting a public right. Similarly, in *Stonewall Construction*, *supra*, 151 A.2d at 536, an action brought by the District of Columbia Unemployment Compensation Board to recover unpaid compulsory unemployment contributions, we held that the Board's action was not barred by the statute of limitations because it asserted a public right. Appellees argue that *Metropolitan Railroad* renders *Weiss* invalid, and, citing dictum in *Ward v. District of*

Columbia, 494 A.2d 666, 668 n.1 (D.C. 1985), that *Stonewall Construction* is inapposite because in it "the sovereignty of Congress—not that of the District of Columbia—blocked application of the statute." *Id.* The latter argument begs the question. All authority exercised by the District government is derived from congressional mandate.[16] The issue is therefore not whether the relevant power belongs to the District or to Congress, but whether a municipality may wield a congressionally mandated power subject to the protections ordinarily accorded the wielder of that power. This is the crux of the question that the Supreme Court left open in *Metropolitan Railroad*. It is in this legal context that we must examine whether the exercise of a particular power is subject to time-bars or exempt from them.

We conclude that in initiating law suits like the one before us, the District enjoys municipal immunity from the running of time. To this day, the District has legally organized as a municipal corporation. D.C. Code § 1-102 (1987 Repl.). There is, of course, a significant distinction between legislative and municipal powers. The authority that the Constitution grants Congress over the District is unlike any other Article I power, however, in that it necessarily includes state or municipal functions.[17] An objective reading of the Home Rule Act demonstrates that Congress has delegated at least these municipal functions, as well as significant legislative authority, to the District.[18] This delegation includes the

---

16 *See* U.S. CONST., Art. I, § 8, cl. 17; District of Columbia Self-Government and Governmental Reorganization Act ("Home Rule Act"), Pub. L. No. 93-198, 97 Stat. 774 (1973) (codified as amended in scattered sections of Titles 2, 5, 29, 31 & 40 U.S.C. (1982 & Supp. IV 1986); D.C. Code §§ 1-201- 1-299.7 (1987 Repl.)).

17 *See Firemen's Ins. Co.*, *supra* note 11, 157 U.S. App. D.C. at 324-25, 483 F.2d at 1327-28; Note, *Federal and Local Jurisdiction in the District of Columbia*, 92 YALE L. J. 292, 297-300 (1982).

18 *See Firemen's Ins. Co.*, *supra* note 11, 157 U.S. App. D.C. at 325, 483 F.2d at 1328 ("When Congress delegates its police power to the local government, that entity's powers become as broad as those of Congress, limited only by the Constitution or specific Congressional enactment.").

authority to perform public functions, such as providing for public health and safety.[19] Nevertheless, there is no need for us to decide that the District has all the sovereignty of a state to conclude that it enjoys the protection of the *nullum tempus* doctrine. There is considerable authority in other jurisdictions that when a municipality performs a public function, it enjoys legal immunity from the running of time.[20] We

---

19 Appellees do not contend that the delegation of power embodied in the Home Rule Act was unconstitutional, nor could they. "[T]here is no constitutional barrier to the delegation by Congress to the District of Columbia of full legislative power, subject of course to constitutional limitations to which all lawmaking is subservient and subject also to the power of Congress at any time to revise, alter, or revoke the authority granted." *District of Columbia v. John R. Thompson Co.*, 346 U.S. 100, 109 (1953); *see also Firemen's Ins. Co.*, *supra* note 11, 157 U.S. App. D.C. at 325, 483 F.2d at 1328.

20 *See, e.g.*, *City of Bisbee v. Cochise County*, 52 Ariz. 1, 78 P.2d 982, 985 (1938); *Alcorn v. Arkansas State Hosp.*, 263 Ark. 665, _____, 367 S.W.2d 737, 741 (1963) *Noble v. Merchants Nat'l Realty Corp.*, 248 Cal. App. 2d 48, 56 Cal. Rptr. 253 (1967); *Berkeley Metro. Dist. v. Poland*, 705 P.2d 1004, 1007 (Colo. App. 1985); *City of Shelbyville v. Shelbyville Restorium, Inc.*, 96 Ill. 2d 457, _____, 451 N.E.2d 874, 876-77, 71 Ill. Dec. 525, _____ (1983); *Chicago & Northwest Ry. v. City of Osage*, 176 N.W.2d 788, 791 (Iowa 1970); *Unified School Dist. No. 400, Butler County v. Celotex Corp.*, 6 Kan. App. 2d 346, _____, 629 P.2d 196, 203 (1981); *Kluckhuhn v. Ivy Hill Ass'n, Inc.*, 55 Md. App. 41, _____, 461 A.2d 16, 21, *aff'd*, 298 Md. 695, 472 A.2d 77 (1983) (discussing adverse possession in context of general rules regarding limitation of actions); *State v. Scientific Coating Co.*, 228 N.J. Super. 320, _____, 549 A.2d 874, 876 (1988); *Bd. of Educ., School Dist. 16 v. Standhardt*, 80 N.M. 543, _____, 458 P.2d 795, 801 (1969) (treating subdivisions that perform public functions as "arm of the state"); *Incorporated Village of Island Park v. Island Park-Long Beach, Inc.*, 274 A.D. 930, _____, 83 N.Y.S.2d 542, 543, *rearg. and appeal denied*, 274 A.D. 994, 85 N.Y.S.2d 510 (1948) (dictum); *City of Reidsville v. Burton*, 267 N.C. 206, _____, 152 S.E.2d 147, 151 (1967); *Rowan County Bd. of Educ. v. United States Gypsum Co.*, 87 N.C. App. 108, _____, 359 S.E.2d 814, 819, *review denied*, 321 N.C. 298, 362 S.E.2d 782 (1987); *City of Kettering v. Burger*, 4 Ohio App. 3d 254, _____, 448 N.E.2d 458, 466, 4 O.B.R. 471, _____ (1982); *State v. Shelton*, 727 P.2d 103, 105 (Okla. 1986); *Chizek v. Port of Newport*, 252 Or. 570, _____, 450 P.2d 749, 753 (1969); *Frailey Township School Dist. v. Schuylkill Mining Co.*, 361 Pa. 557, _____, 64 A.2d 788, 790 (1949); *Bryant v. Mission Mun. Hosp.*, 575 S.W.2d 136, 137 (Tex. Civ. App. 1978); *Bellevue School Dist. No. 405 v. Brazier Constr. Co.*, 103 Wash. 2d 111, _____, 691 P.2d 178, 181-82 (1984).

acknowledge that contrary authority exists,[21] but it is clear that a circumscribed municipal immunity in the performance of public functions is today the rule in an overwhelming majority of states, and we recognize its authority here.[22] Our opinions in *Weiss* and *Stonewall Construction* merely apply the majority rule.

Moreover, today's holding is consistent with *Metropolitan Railroad* because the Supreme Court there expressly declined to hold that no municipal activities are insulated from the statute of limitations by the doctrine of *nullum tempus*. 132 U.S. at 12. The Court did note that a municipal corporation generally has "the right to sue and be sued, and [is] subject to the ordinary rules that govern the law of procedure between private persons." Id. at 9. Yet today a host of jurisdictions hold that municipalities enjoy a limited immunity not shared by private parties. Do they contradict a holding of the Supreme Court?

The answer lies in the question: they are not contradicting the Supreme Court. The issue in *Metropolitan Railroad* was not, as it is here, the existence of municipal immunity, but rather, whether the District of Columbia might invoke *sovereign* immunity. The answer was that it could not do so,

---

21 *State v. Mudd*, 273 Ala. 579, _____, 143 So. 2d 171, 174 (1962); *Mayor & Council of Wilmington v. Dukes*, 52 Del. 110, _____, 157 A.2d 789, 794-95 (1960); *Ideal Farms Drainage Dist. v. Certain Lands*, 154 Fla. 554, _____, 19 So. 2d 234, 235 (1944); *City of New Bedford v. Lloyd Investment Associates, Inc.*, 363 Mass. 112, _____, 292 N.E.2d 688, 691 (1973); *City of Coon Rapids v. Suburban Eng'g, Inc.*, 283 Minn. 151, _____, 167 N.W.2d 493, 495 (1969); *In re Ernst's Guardianship*, 158 Neb. 15, _____, 62 N.W.2d 110, 111 (1954); *Lakeside Township v. Northwestern Trust Co.*, 74 N.D. 396, _____, 22 N.W.2d 591, 592 (1946); *Hatcher v. State*, 125 Tex. 84, _____, 81 S.W.2d 499, 500 (Tex. Crim. App. 1935).

It should be noted, however, that of these eight authorities, two involved municipal immunities specifically abrogated by statutes, *Ideal Farms*, *supra*, 154 Fla. at _____, 19 So. 2d at 235; *New Bedford*, *supra*, 363 Mass. at _____, 292 N.E.2d at 691, and one denied the municipality an immunity that it did not even recognize to be available to the state. *Coon Rapids*, *supra*, 283 Minn. at _____, 167 N.W.2d at 495.

22 The doctrine is well settled enough to be stated as the "general rule" in the textbooks. See 17 E. McQUILLIN, MUNICIPAL CORPORATIONS § 49.06 (3d ed. 1972 & 1983 Cum. Supp.).

because the District was not a state, and Congress had then narrowly restricted the rights and powers that the District was authorized to exercise. By "sovereign immunity," of course, we refer to the immunity a political community or institution enjoys by right of its political status, and not merely by virtue of the legal function it performs at a given time.[23] While sovereign immunity may be waived by permission or by statute, *Glidden Co. v. Zdanok*, 370 U.S. 530, 563-64 (1962) (immunity from tort liability), it continues to exist as a privilege the sovereign may reclaim. *Maricopa County v. Valley National Bank*, 318 U.S. 357, 362 (1943) (immunity from liability to suit); *Pass v. McGrath*, 89 U.S. App. D.C. 371, 372, 192 F.2d 415, 416 (1951) (immunity from liability to suit). By contrast, the derivative immunity a municipality enjoys inheres in it only when it performs a sovereign function, such as the vindication of a public right, and then only with reference to the function performed.[24] We do not reach the issue of sovereignty here; we merely hold that in its municipal capacity, the District enjoys a common-law immunity under the doctrine of *nullum tempus*.[25]

---

23 This distinction has sometimes been expressed as a dichotomy between "sovereign immunity," as we use it here, and "governmental immunity," which is enjoyed by municipal subdivisions "only when engaged in 'governmental' as distinguished from 'proprietary' functions." *Myers v. Genesee County Auditor*, 375 Mich. 1, _____, 133 N.W.2d 190, 191 (1965); *see also Ramsey v. Prince George's County*, 18 Md. App. 385, _____ n.2, 308 A.2d 217, 219 n.2 (1973) (*citing Myers*); *Ross v. Consumers Power Co.*, 420 Mich. 567, _____, 363 N.W.2d 641, 650 (1984) (citing *Myers*); 57 AM. JUR. 2d *Municipal, County, School and State Tort Liability* § 3 (1988).

24 See authorities cited *supra* note 23.

25 Accordingly, we do not reach the effect of changes in the District's political status on the extent to which it is protected by sovereign privileges beyond those attached to the particular powers it may perform. *Compare Metropolitan Railroad, supra*, 132 U.S. at 7 ("Legislative powers have now ceased, and the municipal government is confined to mere administration."), *with* Home Rule Act § 102 ("the intent of Congress is to delegate certain legislative powers to the District of Columbia . . . [and] grant to the inhabitants of the District of Columbia powers of local self-government."). In dicta in *Ward, supra*, 464 A.2d at 668, we took a skeptical view of the impact such

Underlying our recognition of a doctrine widely applied elsewhere is a functional rather than a formalistic reading of the immunity issue. We have already noted that, like immunity from suit, immunity from statutes of limitations and repose is the artifact of a royal prerogative. Nevertheless, courts did not vest this right in the successor governments as a mere legal inheritance, but adopted a more substantive justification consistent with the public good: defense of the public interest and public fisc from the negligence of the government's agents. The administration of the public interest and the public fisc in the District of Columbia has been vested by act of Congress in the District of Columbia government. That government has been charged, among other things, with seeing to the health and safety of the citizens in its jurisdiction. *See* D.C. Code § 1-315 (1987 Repl.) (authorizing specific police regulations); D.C. Code § 1-319 (1987 Repl.) (authorizing general regulations "for the protection of lives, limbs, health, comfort and quiet of all persons and the protection of all property"). Under such circumstances, to hold that legal immunity resides in the actor rather than the act would divorce the principle from its purpose. It would expose the citizenry of the District, unlike the citizens of any other United States jurisdiction, to hazard without redress. Indeed, it would render nugatory the very functions Congress intended to strengthen by vesting them in a local government.

C. *The Legal Relationship Between the District and Congress*

Appellees attempt to persuade us that because Congress is sovereign in the District, the government of the District of Columbia is devoid of the authority necessary to enjoy municipal immunity. They contend by analogy to the relationship between a state and its municipal subdivisions that

---

changes might have. We note that under the Home Rule Act, the District government continues to exist as a "body corporate for municipal purposes, and may . . . sue and be sued . . . and exercise all other powers of a municipal corporation. . . ." Home Rule Act § 102(a).

Congress is sovereign, and is thus the sole repository of sovereign immunity in the District. We disagree. The abundance of cases holding that municipal subdivisions enjoy limited immunities belies this position, and the logic underlying Congress' delegation of powers renders it completely untenable.

There is general agreement that the Constitution gives Congress plenary power over the District of Columbia.[26] Thus there can be no doubt that theoretically, if Congress chose, it could govern the District directly, without the help of a municipal government or its agencies. Since Congress is sovereign in the District, it enjoys the usual sovereign immunities, including the benefit of *nullum tempus*. In creating a municipal government, and in ultimately granting it broad governmental powers, Congress intended, among other things, to "relieve [itself] of the burden of legislating upon essentially local District matters." Home Rule Act, § 102(a) (Statement of Purposes).

> The Home Rule Act explicitly provides that the legislative power of the District shall extend to all rightful subjects of legislation within the District consistent with the Constitution of the United States and the provisions of this Act subject to all the restrictions and limitations imposed upon the States by the tenth section of the first article of the Constitution of the United States.

Id., § 302. Thus Congress granted broad, but not exclusive, legislative powers to the District, analogous to the powers of

---

26 "Congress' power over the District of Columbia encompasses the *full* authority of government, and thus, necessarily, the Executive and Judicial powers as well as the Legislative." *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 76 (1982) (emphasis in original). *See* U.S. CONST., Art. I, § 8, cl. 17:

> The Congress shall have Power . . . [t]o exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings. . . .

the states, and directed to the performance of many "public functions" typically exercised by the government of a state.

The supposition that Congress delegated to the District government "all rightful subjects of legislation . . . consistent with the Constitution," and established the foundations of self-rule, without also granting the District immunity under the doctrine of *nullum tempus*, engenders serious logical difficulties. It involves admitting that, except when Congress explicitly disapproves District legislation, it becomes the law of the jurisdiction, and that all significant public policy and public services originate with the agencies and instrumentalities of the District, yet only Congress enjoys immunity from the running of the statutes of limitations and repose. It suggests that while the District government performs practically all public functions in this jurisdiction, only Congress, which rarely participates directly in local affairs, enjoys the benefit of an immunity designed to protect those public functions. Thus, under this theory, Congress' immunity is irrelevant when the District acts, even if the District performs functions—as it must—which are within the scope of congressional immunity. The protection is thereby separated from its purpose, and the public, which is supposed to be the beneficiary of the immunity, is bereft of it. Of course, "[t]his would be to overthrow in fact what was established in theory; . . . an absurdity too gross to be insisted on."[27]

It cannot be argued that Congress intended to remove this protection or diminish its own power by the mere act of delegating it to the District. Yet this is the inevitable consequence of a formalistic, rather than functionalistic, reading of the *nullum tempus* doctrine. Common sense counsels that the protection of *nullum tempus*, if it is to be meaningful, must follow the function performed, and not reside only in institutions that, as a matter of policy, refrain from exercising the

---

27 The voice we adopt here is, of course, that of Chief Justice Marshall, speaking in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

functions the doctrine was designed to insulate.[28] We therefore conclude that the District of Columbia is immune from the running of the statutes of limitations and repose when it brings suit seeking to vindicate public rights and involving the performance of public functions.

III. The Public Function Requirement

Although we have now concluded that the District enjoys the immunity it seeks, we emphasize that this immunity is highly circumscribed. The government enjoys immunity from the running of time only when it sues to vindicate public rights. Thus, our task will not be complete until we have determined whether, with respect to the particular issue on appeal, the District is suing to vindicate a public or a proprietary right.[29]

---

28 Indeed, it can be argued that the congressional delegation of authority to perform public functions automatically includes a delegation of the privileges and immunities that are part and parcel of that authority. We refer again to appellees' citation of our opinion in *Ward v. District of Columbia*, *supra*, 494 A.2d at 668 & n.1. In *Ward* we questioned our earlier holdings in *Weiss*, *supra*, and *Stonewall Construction*, *supra*, which we now specifically reaffirm. We remarked that *Stonewall Construction*, in which we found that the District of Columbia Unemployment Compensation Board enjoyed immunity from the statute of limitations, involved an exercise of congressional rather than District sovereignty, since the Board had been created by congressional legislation. Id. (interpreting D.C. Code § 46-304 (1951)). But of course, every District instrumentality ultimately derives its authority, through the Home Rule Act or other legislation, from a congressional mandate. Thus, to the extent that the rule of *Stonewall Construction*, as interpreted by *Ward*, applied to the Unemployment Compensation Board, it must also apply to every District instrumentality that performs a delegated public function.

29 The distinction between public and private functions retains its vitality as applied to the *nullum tempus* doctrine despite the ruling of the United States Court of Appeals for the District of Columbia Circuit in *Spencer v. Gen. Hosp. of the District of Columbia*, 138 U.S. App. D.C. 48, 50, 425 F.2d 479, 481 (1969), that it lacks continuing vitality in tort immunity cases. In the context of a tort action against a public hospital, the Spencer court observed that governmental and propriety roles are interrelated and some-

This question is by no means an easy one. The line between rights that accrue to the public's benefit and those that are ultimately proprietary to the government is a fine one, especially since any financial loss to the government is ultimately a loss to the public fisc.

In *Weiss*, *supra*, where we held that the District's suit to recover fees owed to a public hospital was not barred by the statute of limitations, we said:

> The District of Columbia is seeking to replenish its treasury of money expended by a public instrumentality in the exercise of a public function. Recovery of the funds, which will benefit the public as a whole when applied to the continued operation of Glenn Dale Hospital, should not be made contingent on the diligence of public servants.

263 A.2d at 640. This passage emphasizes the expenditure of the disputed monies by a public instrumentality, its application to a public function, and the policy against allowing the laxity of public servants to erect a bar to suit. We stress, however, that while all monies the District sues upon affect the public fisc, it does not follow that every time the District sues for money it performs a public function. While the line is hard to draw, it can fairly be stated that something more is required than a naked financial interest; thus in *Weiss* we spoke of replenishing the treasury of funds earmarked for the performance of a particular public function. Where the District acquires a right of action directly related to its duty to perform a service to the public, or to vindicate an over-

---

times difficult to distinguish. "We perceive no distinctions," the court explained, "between the operation of hospitals, on the one hand, and schools, on the other, that offer meaningful bases for differentiation between tort liability for acts of the kind alleged in those cases and in the one before us." *Id.* The *Spencer* court found that the distinction often impeded suits even when it was in the public interest for them to proceed, and therefore discarded the distinction. However, the decision was by its terms applicable to tort cases brought against a municipal corporation, and its rationale in no way suggests that the distinction should be discarded where, as in cases involving the principle of *nullum tempus*, it protects the public interest.

whelmingly public interest or right, a suit to recover money damages to enable the District to perform that service is public rather than proprietary. Of course, there may be other considerations, unique to each case, which must guide future courts in determining whether the public function test is met.

The facts of the claim on appeal satisfy us that the District is suing to vindicate a public right. Only the most narrow reading could interpret the District's claims as purely proprietary. The hazard presented, as we have seen, is an enormous one. More than 2400 public buildings are affected. Many of these buildings, such as schools, libraries, hospitals, and government offices, are for the general use of the public, and hundreds or even thousands of people pass through each of them every day. Any child who grows up in the District and attends a public school is massively exposed; anyone who works for the District government or frequents District offices suffers similar exposure. Many thousands of residents in District public housing literally live with this threat. The men and women who serve the jurisdiction in the police and fire departments are exposed daily. We have seen that the diseases asbestos engenders are numerous, painful and deadly; the percentage of those exposed who eventually fall victim to an asbestos-related illness is prohibitively high. Unquestionably, the public at large has a profound interest in the elimination of a danger so extreme and widespread.

At the same time, where other factors point to the public nature of the claim, it becomes irrelevant that the District is suing to replenish its own funds. Naturally, a suit of this kind involves the government's interest in seeing to it that the treasury suffers no loss as the result of expenditures to remove a public danger. However, it is impossible to extricate this proprietary interest completely from the larger public function; every time a government sues for money to vindicate a public interest, it is in some sense its "own" money that the government seeks to replenish. At oral argument, appellees attempted to draw a comparison between the interest the government asserts here and that of a large landlord, or the owner of an office building, whose property is similarly contaminated. They argued that the former case, like

the latter, presented a purely proprietary interest. However, apart from differences in the scale of the threat, it is obvious that a private owner never performs a "governmental" function, even if her problems are comparable to those of the government, simply because she is not a government herself. No matter how many tenants she may have, her duties to them are private ones because they arise from private contractual obligations and she is a private person; but the government performs a public duty when it protects the health and safety of the public at large. Here the government is suing for the cost of removing a public danger resulting from the alleged tortious activities of appellees; the damages recovered from such a suit would therefore be used in the performance of a public function. Under these circumstances, the District's financial interest is secondary.

Appellees have cited a number of cases from other jurisdictions which, they assert, prove that the interest that the District asserts here is only a proprietary one. They observe that in *Trustees of Bergen Community College v. J.P. Fyfe, Inc.*, 188 N.J. Super. 288, ____, 457 A.2d 83, 88 (1982), *aff'd*, 192 N.J. Super. 433, 471 A.2d 38 (1983), *certification denied*, 96 N.J. 308, 475 A.2d 598 (1984), the court held, "[W]here plaintiff [community college] sues because of alleged" defects in building roofs, "it is clear that it stands on no different footing from any owner of a building." However, *Fyfe* dealt only with structural roofing defects, and there is no indication that those defects posed a danger to public safety or welfare. In the context of mere repairs, therefore, the college's suit was essentially indistinguishable from a private action of the same nature. Further, in *Fyfe*, the plaintiff was a county college legally distinct from the state, county, or municipality, and subject by statute to the rules governing suits by private parties. By contrast, the instant case involves a suit by the government of the entire District, which is, moreover, a distinct political community and not the political subdivision of a state. While the District bears the relationship of a municipality to the United States Government, there is no larger population, distinct from the populations of the other states, of which it is a subset. Accordingly, the municipal sta-

tus of this jurisdiction does not vitiate the impact of the alleged tort on the "general public" rather than some subgroup within the whole jurisdiction.

Appellees also argue from a series of federal cases in Tennessee that the removal of asbestos from schools is not a public function. The Sixth Circuit in *Anderson County Board of Education v. National Gypsum Co.*, 821 F.2d 1230, 1233 (6th Cir. 1987), applying Tennessee law, held that a suit by a local board of education to remove asbestos from public school buildings was not brought to further a public function, since it was one "in which only local citizens [were] interested, as distinguished from [those] in which all the people of the state are interested," *id.*, and it did not affect the finances of the state as opposed to the school board. Although we do not necessarily adopt the test used by the Sixth Circuit in applying Tennessee law, we note that the District's claim would survive it, since all citizens of the District are affected by the asbestos contamination involved, and the District's finances, rather than those of a subdepartment such as a local school board, are at stake.

In *Kelley v. Metropolitan County Board of Education*, 615 F. Supp. 1139, 1152 (M.D. Tenn. 1985), *rev'd on other grounds*, 836 F.2d 986 (6th Cir. 1987), the court stated, in dicta, that while the provision of public education is a governmental function, the maintenance of school buildings is merely proprietary. *Kelley*, however, noted this principle only by way of example, since the case involved school desegregation, not the abatement of a public health hazard. Moreover, in so commenting, the *Kelley* court relied on a magistrate's opinion in *County of Johnson, Tennessee v. United States Gypsum Co.*, 580 F. Supp. 284 (E.D. Tenn. 1984), which was soon reversed in relevant part in *County of Johnson, Tennessee v. United States Gypsum Co.*, 664 F. Supp. 1127 (E.D. Tenn. 1985) (because operation of public schools is a public function, statute of limitations is inapplicable to county action for removal of asbestos in schools).

Finally, appellees cite *West Haven School District v. Owens-Corning Fiberglas Corp.*, No. H-85-1056, slip op. (D. Conn. Aug. 10, 1988), wherein the court held that the statute

of limitations applied to a local school district its action to recover asbestos abatement costs. The *West Haven* court, like the court in *Anderson County*, held that the action involved a local rather than a statewide interest. As we have noted above, this issue is either inapplicable or operates in favor of the District, since the hazard potentially affects practically all of its residents. However, the *West Haven* court, citing *Gauvin v. City of New Haven*, 187 Conn. 180, ____, 445 A.2d 1, 3 (1982), also held that "government acts" (as opposed to proprietary acts) are not only performed for direct public benefit, but are of a supervisory or discretionary, rather than ministerial, nature. Thus, acts "performed in a prescribed manner without the exercise of judgment or discretion," *West Haven*, *supra*, slip op. at 7-8, are unprotected by municipal immunity. However, we could find no other authority for the application of the "discretionary function" requirement to immunity from a statute of limitations. *Gauvin*, like all other cases that have applied the discretionary function rule, interpreted sovereign immunity from tort liability, and not immunity under *nullum tempus*. *See*, *e.g.*, *Spencer*, *supra*, 138 U.S. App. D.C. at 51, 425 F.2d at 482. This distinction is important, since sovereign immunity from tort liability was designed to protect the discretionary acts of governmental officers from the chilling effects of potential liability, while preserving the public's access to justice in merely ministerial cases.[30] No similar policy operates where the government itself brings suit to vindicate public rights. As the District has correctly stated in its reply brief:

---

30 *See City of Shelbyville*, *supra* note 20, 96 Ill.2d at ____, 451 N.E.2d at 877, 71 Ill. Dec. at ____,

> The purpose of the two doctrines, as we understand them, is different: the former [nullum tempus] is designed to preserve public rights when the government is slow to assert them on the public's behalf, while the latter [immunity from tort liability] is used to promote the autonomy of public bodies as entities by insulating them from liability for their actions. They are separate actions, and we do not interpret [the abolition of the latter] as requiring abolition of governmental immunity from statutes of limitation.

> When the government sues to recover from wrongdoers, it serves a public purpose . . . . When, however, government itself has been the wrongdoer, entirely different considerations apply. Courts are naturally reluctant to construe governmental functions broadly when to do so means that the government escapes liability for its misdeeds and its victims remain uncompensated.

Reply Brief for Appellant at 21. Where the *nullum tempus* immunity exists to protect the public from the negligence of public agents or officers, *see Guaranty Trust*, *supra*, 304 U.S. at 132, we do not think it is relevant whether the function that agent or officer failed to perform was ministerial or discretionary.[31]

Finally, we are unconvinced by appellees' analogy to other District of Columbia "public function" cases, which all construe the public or proprietary nature of duties underlying tort actions brought against the District. All of these cases involve lesser functions which, while associated with duties performed by the District to secure public health or safety, are of a lesser scope and would not affect public health or safety as a whole. *See Scull v. District of Columbia*, 102 U.S. App. D.C. 104, 105, 250 F.2d 767, 768 (1957), *cert. denied*, 356 U.S. 920 (1958) (installation of water mains not a governmental function for tort liability purposes); *District of Columbia v. Green*, 96 U.S. App. D.C. 20, 21, 223 F.2d 312, 313 (1955) (operating a public market a proprietary function for tort liability purposes); *Smith v. District of Columbia*, 89 U.S. App. D.C. 7, 10, 189 F.2d 671, 674 (1951) (declining to

---

31 Moreover, appellees argue, quoting *Shifrin v. Wilson*, 412 F. Supp. 1282, 1307 (D.D.C. 1976), that conduct may be deemed discretionary only if liability for the activity would "pose threats to the quality and efficiency of government in the District." Thus, even if the discretionary function test were applicable, under the test proposed by appellees, we would hold the District, intended action in this case to be discretionary, since, contrary to appellees' assertions, the want of immunity would seriously jeopardize the public fisc, thereby undermining the District's efforts to remove the hazard as well as to perform other public functions. Parenthetically, we also note that *Shifrin* construed "discretionary functions" in inquiring whether there was sovereign immunity from tort liability, and not from the effect of a statute of limitations.

hold District immune from tort liability by governmental function analysis for failing to remove snow, but absolving District of liability under ordinary negligence standard); *Thomas v. Potomac Electric Power Co.*, 266 F. Supp. 687, 692 (D.D.C. 1967) (operating a swimming pool a proprietary function). In each, a narrow interest was at stake, involving the safety of individuals or small numbers of people for tort liability purposes; none involved a hazard with an impact as broad as that presented by the widespread asbestos contamination of public facilities. We therefore reject the inference that, because we have held certain duties involving the removal of minor individual hazards to be proprietary, any response to a threat to public safety, no matter how large the threat or for what purpose the response is considered, must also be considered proprietary. Rather, as the foregoing analysis makes clear, each case must be reviewed on its own merits, taking into account the scope and severity of the problem, the cross-section of the population affected, and any other considerations that may clarify the extent to which the public at large is interested in the outcome.

Considering these factors, we must conclude that appellant has articulated a public interest worthy of the municipal nullum tempo protection.

IV. CONCLUSION

Because we find that the District of Columbia enjoys a limited municipal immunity from the effects of the statutes of limitations and repose, and further, that it is a governmental function of the District to remove and abate the widespread contamination of public buildings with asbestos, which poses a substantial threat to public health, we conclude that the District may bring an action for damages resulting from that contamination even after the statutes of limitations and repose would ordinarily have run. Accordingly, we conclude that the trial court improperly granted summary judgment with respect to the claims on appeal. The order granting sum-

mary judgment is therefore reversed, and the case remanded for proceedings consistent with this opinion.

Reversed and remanded.

No. 87-1254
CA14128-84

DISTRICT OF COLUMBIA,

Appellant,

—v.—

OWENS-CORNING FIBERGLASS CORPORATION, ET AL.,

Appellees.

Before:

Rogers, *Chief Judge*;
Newman, Ferren, *Belson, *Terry, Steadman, Schwelb,
and Farrell, *Associate Judges*;
and *Mack, *Senior Judge*.

ORDER

On consideration of appellees' petition for rehearing or rehearing en banc, the response thereto, the motion for leave to file reply memorandum in support of petition, the lodged reply memorandum, and appellant's supplemental statement to petition, it is

ORDERED that the motion for leave to file is granted and the Clerk is directed to file the lodged reply memorandum. It is

FURTHER ORDERED by the merits division* that the petition for rehearing is granted to the extent that a new footnote 5 is inserted at page 7 of the slip opinion, making reference to Title A of the text following the word "Consequences," to read:

We stress that the reference to the sources herein and any reliance on the conclusions drawn thereby, are advanced in support of our holding that the District has brought this lawsuit in the objectively good faith belief that it is necessary to vindicate a public right and not to express or intimate any opinion as to the hazard posed by the particular asbestos products at issue in this litigation. Obviously, the latter question is to be resolved at trial uninfluenced by anything that this court has stated in addressing the preliminary issue of the timeliness of the suit.

It appearing that no judge of this court has called for a vote on the petition for rehearing en banc, it is

FURTHER ORDERED that the petition for rehearing en banc is denied.

PER CURIAM

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

C.A. No. 14128-84
Civil I—Judge Wolf

DISTRICT OF COLUMBIA

Plaintiff

—v.—

OWENS-CORNING FIBERGLASS CORP. *et al.*

Defendants

MEMORANDUM ORDER ON STATUTE OF LIMITATIONS

The court has before it the Motion of Defendants for partial Summary Judgment on the Basis of the Statute of limitations, the plaintiff's opposition thereto, and defendants' reply. Oral argument was heard in open court on December 12, 1986. This court makes the following rulings of law.

The statute of limitations, D.C. Code § 12-301 (1981), applies to the District of Columbia, *i.e.*, the District is not immune from the operation of the statute. *Ward v. District of Columbia*, 494 A.2d 666 (D.C. 1985); *Metropolitan Railroad Co. v. District of Columbia*, 132 U.S. 1 (1889). There is no just reason to delay decision on this question because of pending legislation (D.C. Act 6-261, signed by the Mayor Jan. 8, 1987) doing away with the statute of limitations for and by the plaintiff in this very case. The effect of any such legislation must be dealt with when and if it becomes law after the required 30-day period of Congressional review.

For purposes of the statute of limitations most actions of this type must be brought within three years after the cause of action accrues. D.C. Code § 12-301 (3), (7), (8) (1981). Generally a cause of action is said to accrue at the time

injury occurs. An injury to the District of Columbia occurred (or occurs) in this case when the District (1) knew of presence of asbestos in a particular public building and (2) had sufficient knowledge that asbestos was an intrinsically hazardous material.

At least two scenarios can be envisioned for what the court finds are these separate and distinct injury occurrences: (A) Asbestos could have been installed in a building built, renovated, or leased (with attendant modifications) by the District Government when D.C. officials were aware at the time that asbestos was being installed. (B) D.C. officials may not have known that asbestos was installed when it was installed. Building specifications may have called only for "insulation," or a particular kind of ceiling tile, and its asbestos content was unknown—indeed may still be unknown.

These two scenarios require separate discussion for purposes of the instant motion.

(A)

Under scenario (A) the first element of accrual of a cause of action is satisfied and the primary relevant question remaining for statute of limitations purposes is the second element: When did District officials come to know that asbestos was intrinsically hazardous? Once that knowledge was extant the statute started running. "[T]he relationship between the fact of injury [known presence of hazardous asbestos] and the alleged tortious conduct [sale of installation of the asbestos by a defendant or defendants]" is not "obscure." *Bussineau v. President and Directors of Georgetown College*, 518 A.2d 423, 425 (D.C. 1986). This is therefore not a situation justifying broad application of the "discovery rule," however expansively it may be interpreted.

In the court's view, as a matter of undisputed fact and as a matter of law, the District had actual notice that asbestos was hazardous well before December 14, 1981, the date three years before this suit was filed. The District claims a dispute of fact because it does not know the degree of each hazard where asbestos is present and the most appropriate remedy

for each such hazard. This argument only expresses uncertainty about the District's damages. Moreover, once the intrinsic hazard is known, the District has reason to know of a particular hazard or abatement need (*e.g.*, immediately hazardous friability), even if the optimum abatement method is open to question. The District also claims a dispute of fact because its counsel do not yet know the identity of the defendant manufacturers or distributors of the hazardous asbestos in each location. However, the District admits it may never know that information and seeks to hold defendants jointly and severally liable on market share or enterprise liability theories. The District's alleged disputes of fact, therefore, would not save it from a statute of limitations bar under this scenario. See generally *Kelton v. District of Columbia*, 413 A.2d 919 (D.C. 1980); *Hobson v. Wilson*, 237 U.S. App. D.C. 219, 250-54, 737 F.2d 1, 32-36 (1984), *cert. denied* 105 S.Ct. 1843 (1985); *District of Columbia Armory Board v. Volkert*, 131 U.S. App. D.C. 74, 77, 402 F.2d 215, 218 (1968).

The court rules that the time for plaintiff to bring its action was tolled for some defendants herein by the class action suit in Pennsylvania, *In re Asbestos School Litigation*, 104 F.R.D. 422 (E.D. Pa. 1984), 789 F.2d 996 (3rd Cir. 1986), *cert. denied sub nom. Celotex Corp. v. School District of Lancaster*, 55 U.S.L.W. 3235 (U.S. Oct. 6, 1986) (No. 86-140). *Crown Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983). Therefore plaintiff's claims for known installation of asbestos may relate back to January 17, 1980 at the earliest—three years before that suit was filed. The court finds, however, that plaintiff was on actual notice of asbestos hazard by that time as well. Various defendants would be affected directly and with different dates in this ruling, as indicated in defendants' Reply p. 33, footnote.

Plaintiff's further assertion that it could not have filed suit earlier because market share and enterprise liability had not been established is only an admission that plaintiff was not as resourceful as other litigants. It has no relevance to avoidance of the statute of limitations. Similarly, plaintiff's allegation of fraudulent concealment is of no avail when the court finds, as its does in this case, that the concealment was no

longer successful some time before January 17, 1980. *Hobson v. Wilson*, *supra*, 237 U.S. App. D.C. at 253, 737 F.2d at 35.

The court realizes several additional facets of this scenario of known installation of asbestos at the time of installation: (i) It may be a very small proportion of plaintiff's claims. (ii) It may apply to some of the asbestos in a particular building but not to other asbestos in the same building. What are the parameters of "reason to know" in this and similar situations? (iii) Whose "knowledge" of asbestos installation will suffice? A District of Columbia employee who was a janitor in a remodeled school building at a time asbestos was installed? Probably not. A contracting official? Probably yes. (iv) For any knowing (by the District of Columbia) installation of asbestos subsequent to January 17, 1980, a defense of assumption of risk and/or contributory negligence would undoubtedly prevail in light of the court's ruling above that there is no material dispute as to sufficient knowledge (by high enough D.C. officials) of the hazard of asbestos subsequent to that time. (v) This ruling does not require the court to determine a specific time when the District's knowledge of the hazardous nature of asbestos came into being. It is sufficient for the court simply to rule that, as a matter of law and undisputed fact on the basis of the pleading submitted, that knowledge did exist before January 17, 1980 (or before such later date as may be appropriate pursuant to the court's tolling ruling above). (vi) Discovery must be permitted to determine if scenario (A) applies to any of the public buildings in issue in this case.

(B)

Under scenario (B) neither element of accrual of a District cause of action can be assumed satisfied. Two dates are relevant for each piece of property in question: (1) the date the District learned that asbestos was present in a building, and (2) the date the District came to "know" that asbestos was hazardous. Whichever date is later for a particular piece of property governs the commencement of the running of the statute of limitations for that property. If that latter of the

two relevant dates precedes January 17, 1980 (the earliest date for tolling purposes), the claim for that building is barred. Since the court has ruled that the District did have knowledge of the hazard of asbestos prior to January 17, 1980, it remains for discovery to identify buildings where the District has learned or is learning of the presence of asbestos since that date. Any claims for building for which the District knew there was asbestos present before January 17, 1980 are barred. In circumstances of the mass tort litigation characteristic of asbestos cases, the court doubts that the District can be considered to have "reason to know" of the presence of asbestos in every one of its multitude of public buildings by a date certain. Moreover, there may be instances where the District learned (or learns) of the presence of asbestos in one portion of a building but not another. Once again, what are the parameters of "reason to know" in such situations? Discovery must be permitted with respect to the issues under scenario (B).

* * * * * *

Some subsidiary rulings are ripe as a result of the court's attention to the statute of limitations issue. Plaintiff's restitution claim (Count 7 of its complaint) is merely a type of relief claimed for conduct of defendants alleged in earlier counts. Moreover, even if restitution is deemed a separate cause of action, the court finds that a three-year statute of limitations applies. D.C. Code § 12-301 (8) (1981). Accordingly, the court finds that claim will be time-barred for the same reasons and to the same extent as may become appropriate after discovery for plaintiff's other causes of action.

Count 6 of the plaintiff's complaint seeks a declaratory judgment that plaintiff will be entitled to indemnity from defendants for any claims brought against it seeking damages for any disease or injury resulting from exposure to asbestos in any of its buildings. No such claims are alleged to have yet been made. A cause of action for indemnity does not arise until such damages are incurred. *Aetna Casualty & Surety Co. v. Windsor*, 353 A.2d 684, 686 (D.C. 1976). Plaintiff would therefore seem to be adequately protected and may

implead defendants, or any combination of them, each time a suit for damages is filed against plaintiff. Since that may or may not occur, plaintiff's indemnity claim is premature and speculative, no prejudice results to plaintiff, and Count 6 will therefore be considered dismissed unless a claim is made against the District during the course of this litigation for which indemnity may be appropriate.

It is therefore, this 3d day of February 1987

ORDERED:

1. That defendant's Motion for Partial Summary Judgment on the Basis of the Statute of Limitations is hereby GRANTED IN PART and DENIED IN PART.

2. That to the extent appropriate, this Memorandum Order shall constitute an order under Civil Rule 56 (d) to guide discovery and the future course of this litigation. Counsel may suggest discovery plans or modifications accordingly.

/s/

PETER H. WOLF
Judge

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

C.A. No. 14128-84
Civil I—Judge Wolf

DISTRICT OF COLUMBIA

Plaintiff

—v.—

OWENS-CORNING FIBERGLASS CORP. *et al.*

Defendants

MEMORANDUM ORDER ON STATUTE OF REPOSE

The court has before it the defendants' Joint Motion for Summary Judgment and for a Declaratory Order on the Basis of the Statute of Repose, the plaintiff's opposition thereto, and defendants' reply. Oral argument was heard in open court on December 12, 1986. The court makes the following rulings of law.

For the same reasons set forth in the court's Memorandum Order on Statute of Limitations, issued this same date, the court rules that (1) the statute of repose, D.C. Code § 12-310 (1981), applies to the District of Columbia, (2) there is no just reason to delay decision because of pending legislation, (3) tolling applies to the three years under D.C. Code § 12-301 within which suit must be brought for an injury within the ten-year period of D.C. Code § 12-310, and (4) plaintiff's restitution claim (Count 7 of the complaint) shall be time-barred to the same extent as plaintiff's other claims under the rulings today.

Because of the above tolling ruling, the earliest substantial completion date for a building for which plaintiff may make claims against defendants is January 17, 1970, or such later

date up to December 14, 1971 as may affect some defendants not initially a part of the Pennsylvania class action suit specified at page 33, footnote, defendants' reply on the statute of limitations issue.

The court rules that the plain language of D.C. Code § 12-310, and its application in *President and Directors of Georgetown College v. Madden*, 660 F.2d 91 (4th Cir. 1981), do not prevent the applicability of that statute to buildings substantially completed prior to its 1972 enactment. Similarly, the plain language of the statute precludes defendants' alleged fraudulent concealment from somehow negating the "any action" bar of the statute. *Cf. J.H. Westerman Co. v. Firemen's Fund Ins. Co.*, 499 A.2d 116 (D.C. 1985).

The court will permit further discovery in this case before it rules, as requested by defendants, that plaintiff's claims for four named school buildings are barred at this time. There may be factual issues as to dates of "substantial completion" of various buildings, and there may be mixed issues of law and fact as to what constitutes an "improvement." However, the relevant information would appear to be solely in the possession of plaintiff, and it will clearly have to provide more substantial oppositional evidence than it has so far with respect to the four schools at issue, and other buildings, if it expects to escape summary judgment after appropriate discovery expires. *Cf. Celotex Corp. v. Catrett*, 106 S.Ct. 2548 (1986). The court also does not hesitate to say it will be guided in any questions about "improvements" by *Westerman, supra*, 499 A.2d at 119.

The court realizes that its accompanying Memorandum Order on Statute of Limitations will probably have a larger effect on plaintiff's overall claims in this case than the rulings in this order. For many, if not most, of plaintiff's individual building claims, therefore, the rulings in this order will be relevant only as alternative holdings for purposes of appeal, interlocutory or otherwise. *Cf.* D.C. Code § 11-721 (d); *Plunkett v. Gill*, 287 A.2d 543, 545 n. 9 (D.C. 1972). However, the statute of repose (§ 12-310) and the statute of limitations (§ 12-301) interrelate, *Madden, supra*, 505 F. Supp. 557, 572-73 (D. Md. 1980), *aff'd in part, rev'd in part*, 660

F.2d 91 (4th Cir. 1981), so these two orders must be read in conjunction with each other. The court can envision a case where, under this court's orders, the statute of repose would bar a claim of plaintiff that the statute of limitations would not: a building whose construction was completed before January 17, 1970, in which asbestos was installed as part of those improvements to the real property unknown to plaintiff, the presence of which only became known to plaintiff after December 14, 1981. Plaintiff's knowledge of the intrinsically hazardous nature of asbestos is irrelevant to analysis under the statute of repose.

Accordingly, it is this 3d day of February 1987 ORDERED:

1. That defendant's Joint Motion for Summary Judgment and for a Declaratory Order on the Basis of the Statute of REpose is hereby GRANTED IN PART and DENIED IN PART.

2. That to the extent appropriate, this Memorandum Order shall constitute an order under Civil Rule 56 (d) to guide discovery and the future course of this litigation. Counsel may suggest discovery plans or modifications accordingly.

/s/

PETER H. WOLF
Judge

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

C.A. No. 14128-84
Civil I—Judge Wolf

DISTRICT OF COLUMBIA

Plaintiff

—v.—

OWENS-CORNING FIBERGLASS CORP. *et al.*

Defendants

OPINION

The court has before it the Motion of Plaintiff for Reconsideration of the Court's February 3, 1987 Orders, defendants' memorandum in opposition thereto, and plaintiff's reply. Oral argument was held on June 26, 1987. The existence of this opinion obviously shows the court has granted reconsideration of its orders, but upon that reconsideration the prior orders will be reaffirmed in all respects for the reasons which follow.

Plaintiff's motion was thoroughly anticipated because of a law passed by the District of Columbia City Council since this litigation commenced and intended specifically to apply to this litigation. Some factual background is required. This law suit was filed December 14, 1984. It sought $200 million compensatory and $200 million punitive damages against 37 asbestos product manufacturers and suppliers for the cost of making safe for public use some 2400 D.C. government buildings and schools in which asbestos products may have been utilized during construction or improvement. Twenty-seven defendants remain.

On June 23, 1986 several defendants filed a joint motion for partial summary judgment on the basis of the statute of limitations, D.C. Code § 12-301 (1981). Twenty-three days later the Corporation Counsel's Office forwarded to the City Council a bill, No. 6-510, proposing amendment of that statute and the statute of repose, D.C. Code § 12-310. In summary, that bill made any statute of limitations or repose inapplicable "to actions brought by the District of Columbia government." §§ 3(b) and 4. Section 6 provided, "This act shall apply to actions pending in a court on July 1, 1986 . . . ," of which this case was the only one "brought by the District of Columbia government." Plaintiff then filed a motion for extension of time to reply to defendants' motion for summary judgment, suggesting that the court not decide the motion until the bill became law as anticipated in March 1987 after the required period of Congressional review. At a status hearing on September 26, 1986, the court indicated it would proceed to decide the motion withstanding the pending bill. It ordered briefing by plaintiff District of Columbia. Defendants thereafter filed a joint motion for Summary Judgment and for a Declaratory Order on the Basis of the Statute of Repose. Oral argument was held on both motions on December 12, 1986, and the court decided them by memorandum orders issued February 3, 1987. The District now seeks reconsideration of those orders in light of the fact that on February 28, 1987 the bill did become D.C. Law 6-202, the D.C. Statute of Limitations Amendment Act of 1986.

The dimensions of this litigation are obviously enormous. This issue will drastically affect the scope of further discovery and trial and will undoubtedly be appropriate for discretionary interlocutory appeal under D.C. Code § 11-721(d) (1981) and the criteria specified in *Plunkett v. Gill*, 287 A.2d 543, 545 n. 9 (D.C. 1972). However, the appellate court would presumably not find the issue of the retroactive application of the new statute ripe for decision without knowing whether it would make any difference. This court therefore felt that it was incumbent upon it to decide defendants' motions under the pre-existing statutory scheme, especially since plaintiff argued that even the old statute of limitations did not apply

to the District of Columbia when it was suing in the pubic interest. *Stonewall Construction Co. v. McLaughlin*, 151 A.2d 535 (D.C. App. 1969).

This court held on February 3, 1987 that the pre-existing statute of limitations and statute of repose *did* apply to the District of Columbia in this litigation, notwithstanding the suit's obvious public interest. *Ward v. District of Columbia*, 494 A.2d 666 (D.C. 1985); *Metropolitan Railroad Co. v. District of Columbia*, 132 U.S. 1 (1989). In addition, the court granted summary judgment in favor of defendants holding that on the first crucial question whether high District officials were aware of the hazards of asbestos three years or more before this suit was filed, D.C. Code § 12-301(3), (7), (8), there was no dispute of material facts. For example, the District had indisputably sought appropriations from Congress in 1979 for asbestos clean-up, *five* years before suit was filed. Applying the discovery rule for tort litigation, that left questions for discovery and trial on the second series of crucial issues: (a) whether the District "knew" asbestos was present in any particular building or school three years before suit was filed (applying the statute of limitations), and (b) whether any particular building or school was "substantially completed" thirteen years (ten years under the statute of repose, D.C. Code § 12-310, plus three years under the statute of limitations) before suit was filed. These facts are being learned now as the District pours through thousands of construction specifications and documents in the ongoing discovery process in this case. Since the District had joined in a class action suit in Pennsylvania against many of these same defendants on January 17, 1983, this court ruled that tolling pushed these three- and thirteen-year time periods back as early as that measuring date for some defendants. The net effect of this court's rulings on February 3, 1987 is that the District can maintain that suit (provided the court's rulings are sustained on appeal and provided the new statute cannot be given retroactive effect) only for buildings built or improved since January 17, 1970 even if District officials did *not* know asbestos was installed therein, and only for build-

ings built or improved since January 17, 1980 if District officials *did* know that asbestos was utilized in the construction.

The District has estimated, as it was requested to do when briefing for the pending motion was scheduled, that the court's rulings may eliminate 75 to 80 percent of its building claims. The course of this case will be drastically affected. If plaintiff prevails in its contention that the new "nonstatute" of limitations should cause the court to reverse its February 3 rulings, defendants will justifiably request an interlocutory appeal; if plaintiff fails, the District will justly seek an interlocutory appeal.

The stage is thus set for the court to address the question posed by the District's motion for reconsideration: Does D.C. Law 6-202, mandating that no statute of limitations or repose applies to an action brought by the District of Columbia, including any case already pending on the specified date of July 1, 1986, apply to this case?

A court, including an appellate court, must apply the statutory law in existence at any time prior to final decision. *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801) (Marshall, C.J.). However, a law is presumed not to be retroactive unless the intention otherwise of the legislature is clear. *Barrick v. District of Columbia*, 173 A.2d 372, 375 (D.C. 1961), *aff'd sub nom. Swenson v. Barrick*, 112 U.S. App. D.C. 342, 302 F.2d 927 (1962). There is no question that retroactivity was explicit and intended in D.C. Law 6-202. The District cites *Campbell v. Holt*, 115 U.S. 620 (1885), reaffirmed by *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945), as specifically holding that statutes of limitations may be applied retroactively. According to these cases, such statutes are procedural only, affect merely remedies, and do not impart property rights that cannot be taken without just compensation or due process of law. It is also obvious, however, that these holdings involved only private parties. The government that changed the statute of limitations was not itself a party to the litigation in *Campbell*, *Chase*, and similar cases cited by the District.

Defendants, therefore, counter with three arguments: D.C. Law 6-202 cannot be applied because (1) it would be manifest injustice to do so, (2) it is constitutionally violative of due process of law, and (3) it constitutionally offends the principle of separation of powers. The first—"manifest injustice"—stems from *Bradley v. School Board of the City of Richmond*, 416 U.S. 696 (1974), foreshadowed by language in *Chase, supra*, 325 U.S. at 315-16, and adopted by the District of Columbia Court of Appeals in *Scholtz Partnership v. District of Columbia Rental Accommodations Commission*, 427 A.2d 905 (D.C. 1981). Second, statutes of repose at last, such as set forth in D.C. Code § 12-310 (1981), do impart vested or substantive rights, *President and Directors of Georgetown College v. Madden*, 505 F.Supp. 557 (D.Md. 1980), *aff'd in part*, 660 F.2d 91 (4th cir. 1981), that may not be retroactively repealed without violating due process. Defendants also argue that D.C. Law 6-202 offends due process because it is arbitrary and irrational. Finally, defendants contend that the landmark case of *United States v. Klein*, 80 U.S. 128 (1871), is applicable in this case, standing for the proposition that the legislative and executive branches may not promulgate a law that dictates the result in litigation pending in the judicial branch of government without violating the principle of separation of powers.

The parties have filed excellent briefs. Their respective case authorities—far more numerous than recited above—have been analyzed and distinguished by counsel for each side in the fashion one expects of highly competent advocacy. It would add little for the court to repeat or expand that detailed, yet relevant, parsing. At the same time there is considerable overlap among the three theories under which defendants assert D.C. Law 6-202 should not be applied in this case. The court, accordingly, prefers to take a broader view that, hopefully, accounts for these theories and authorities in a more compelling way.

It has been said of the late Chief Justice Warren that he continually asked the question—frequently of counsel in oral argument—"Yes, counsel, but was it *fair*?" That is *the* relevant question in this case. We have a situation where a major

suit was filed in 1984 by the government. It was faced with some troublesome motions filed in 1986, and then proceeded to do *what no other litigant can do*—it changed the rules in its favor after the battle had been joined. In the May/June 1987 issue of *The Washington Lawyer*, the official journal of the 45,000-member District of Columbia Bar, there is an interview with Solicitor General Charles Fried. At p. 59 he describes his greatest disappointment litigating before the Supreme Court of the United States. He recites how in the brief for *United States v. Johnson*, 107 S.Ct. 2063 (1987), he

> had tried meticulously to work with what the Court had just said. It was like a chess game, and I had followed their last move and I hadn't done anything dramatic. I just moved a pawn or two up and tried to take meticulously the Court's own words. I felt that what they did was walk up, sweep the pieces off the table and say "you lose."

While it is the Supreme Court's unique location at the pinnacle of the legal system in the United States that enables it to do as Solicitor General Fried described, it may not fairly be done in this case by the legislative and executive branches of government when the chess table is being used in litigation already underway in this court.

D.C. Law 6-202 was forwarded to the City Council in response to defendants' motion, introduced by the Chairman at the request of the Mayor as soon as the Council returned from summer recess, approved by the Judiciary Committee after hearing from two witnesses (Acting Corporation Counsel James R. Murphy and his deputy) in a "public roundtable" discussion, and passed by the Council on the "consent agenda" with a waiver of the rules requiring delay after reporting by committee. In the Judiciary Committee, the following exchange occurred between the Chairperson and the Deputy Corporation Counsel in charge of the Civil Division.

> *Chairperson*: . . . [I]t looks like the Bill's main purpose is to protest the District insofar as there are asbestos-related cases. How many cases are pending now?

> *Mr. Grossman*: The major lawsuit involving asbestos is the District's lawsuit against approximately 37 manufacturers and suppliers of asbestos to the District of Columbia government, including the District's buildings. There is a very significant cost, of course, in the abatement and the removal of this asbestos. So our lawsuit goes to the point.

Earlier, Mr. Murphy had testified:

> While the District had advanced the argument in court in support of its position that its pending litigation against asbestos manufacturers for the cost of removing asbestos from public buildings is not barred by any statute of limitations, Bill 6-510 would remove the issue from any doubt.

The enactment of this legislation seems to this court to be precisely what the Supreme Court meant when it said in *Chase Securities Corp. v. Donaldson*, *supra*, 325 U.S. 304, 315-16 (1945), that it assumed "that statute of limitations, like other types of legislation, could be so manipulated that their retroactive effects would offend the Constitution."

Statutes of limitation are inherently arbitrary. They reflect legislative judgments that potential liabilities must be permitted to cease at some point in time. ("[A]ctions . . . may not be brought after the expiration of the period specified . . . from the time the right to maintain the action accrues . . . ." D.C. Code § 12-301.) This court has ruled that under the former law, the government was bound by that same legislative judgment and potential unfairness. Courts have almost uniformly responded to this unfairness by their development of the "discovery rule"—a statute of limitations does not begin to run until the injury is discovered or reasonably should have been discovered by the injured party. See generally *Bussineau v. President and Directors of Georgetown College*, 518 A.2d 423 (D.C. 1986). This court also applied the discovery rule in this case. The D.C. government, anticipating how the court would rule under its obligation to apply the law fairly—to governments representing taxpayers

as well as to alleged toxic polluters—sought to change the rules to be applied in this case. It did so unabashedly in its own pecuniary self-interest.

A statute of repose, such as D.C. Code § 12-310, is a different kind of limitation ("any action . . . shall be barred unless . . . such injury occurs within the ten-year period beginning on the date the improvement was substantially completed"). The time within which the action must be brought is entirely unrelated to the accrual of a cause of action through injury or its discovery—its effect can be to prevent what otherwise might be cause of action from ever arising. It thus has been held as defining substantive rights rather than altering or modifying a remedy. *President and Directors of Georgetown College v. Madden*, *supra*, 505 F.Supp. 557, 570-75 (D.Md. 1980). The court agrees with the reasoning in *Madden*, *id.* at 571, 573, that defendants acquired a grant of immunity from suit when the 13-year period passed from the date a building or improvement was completed. The court applied this 13-year period in its February 3, 1987 rulings. Once again, the District sought in D.C. Law 6-202 to change retroactively this potentially unfair rule, as anticipated it would apply to the District in this case. Again, it did so unabashedly in its own pecuniary self-interest.

It is not enough, therefore, for the District to say that the elimination of the statutes of limitation and repose for and by the D.C. government merely results in a trial of this case on the merits, and that a particular *result* of the litigation is not being dictated to the court in violation of separation of powers or in violation of defendants' rights. Defendants herein were immune from a major portion of this suit on the day it was filed, by application of statutes that applied as unfairly to the municipality as to any other litigant. Those statutes may not fairly be changed retroactively to apply to this case.

District of Columbia courts have refused before to apply statutory changes retroactively. In *Scholtz Partnership v. District of Columbia Rental Accommodations Commission*, *supra*, 427 A.2d 905, 917 (D.C. 1981), which adopted the

manifest injustice standard of *Bradley v. School Board of the City of Richmond, supra*, 416 U.S. 696 (1974), the D.C. Court of Appeals held that one of the appellant-landlords (No. 79-435) had a vested, matured, unconditional, statutory, property right to determination of his rental increase petition within 60 days that could not be retroactively abrogated by the new statute. The other appellant-landlords, however, had "a mere economic expectancy anchored in" procedure that could be defeated "by a proper exercise of the police power." 427 A.2d at 918.

In *Barrick v. District of Columbia, supra*, 173 A.2d 372, 376 (D.C. 1961), *aff'd sub nom. Swenson v. Barrick*, 112 U.S. App. D.C. 342, 302 F.2d 927 (1962), a new statute that retroactively effected an increased burden of proof from negligence to gross negligence for plaintiff's pending suit against a D.C. ambulance driver was held to be "an unconstitutional deprivation of appellants' property right" in a common law cause of action. See also *Gibbs v. District of Columbia*, 180 A.2d 891 (D.C. 1962), where the Court of Appeals held it was error for the trial court retroactively to apply the same statute to an accident that occurred five months prior to its enactment.

Plaintiff District of Columbia cites only two cases where a governmental entity was itself a litigant when retroactive application of a new statute was upheld. In *State of New Jersey, Department of Environmental Protection v. Ventron Corp.*, 94 N.J. 473, 468 A.2d 150 (1983), a statute affecting chemical waste clean-up remedies was applied retroactively, but the defendant polluters had also been adjudicated liable under the common law and earlier statutes. In *Schwarzkopf v. Sac County Board of Supervisors*, 341 N.W. 2d 1, 7 (Iowa 1983), it was held that a new statute did not violate separation of powers where it was only "a belated assertion of a power inherently possessed by the legislature." Both cases reflected an exercise of governmental police power not contended, or evident, in the controversy herein. In neither case did the government's statutory action result in a feathering of the government's own nest, as is argued here.

In a case relied upon by both sides in this litigation—*United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980)—the statute Congress retroactively applied was described by the Court as a waiver by the United States of a defense of *res judicata*. The D.C. City Council's statute here attempts the "waiver," indeed the expurgation, of defenses of the government's opponents in ongoing litigation already begun.

The court does not mean to imply that this decision is a simple one or an easy one or one in which the law is crystal clear. It is a serious matter to say that the legislature's will expressed through a lawfully enacted statute, signed by the chief executive, shall not be permitted to apply in a particular case. This is a serious law suit for a large amount of money brought by, and on behalf of, the citizens as represented by their government. There are serious allegations of corporate compensatory and punitive liability against manufacturers and suppliers of asbestos, a substance known for its potential to produce asbestosis and cancer in humans over long periods of exposure to its dust. But the law must endeavor to treat like cases alike—big or small, government plaintiff or not, serious allegations or trivial. Even if this court's rulings are sustained and an estimated 75 to 80 percent of plaintiff's claims are barred, the District will still have a lawsuit claiming $40 to $50 million in compensatory damages—by no means a small case or a trivial one.

The court has also considered ruling differently on the pending motion for reconsideration as between the court's February 3 statute of limitations ruling and its statute of repose ruling. The latter under *Madden*, *supra*, may arguably lay higher claim to the status of a property right. However, the court's ruling herein is not based solely on constitutional deprivation without due process of law of property rights. It is also based on manifest injustice, separation of powers—and yes, fairness. Accordingly, under the circumstances of enactment of D.C. Law 6-202 described above, the court does not believe such a distinction is appropriate.

The ruling here made—that D.C. Law 6-202 may not constitutionally or fairly be applied to this litigation—may be

crystallized by reference to a case brought to the court's attention by defendants after oral argument on the instant motion for reconsideration: *In re Washington Public Power Supply System Securities Litigation*, MDL No. 551 (W.D. Wash., April 30, 1987) (Browning, J.). From 1977 to 1981 the Washington [State] Public Power Supply System issued $2.25 billion in municipal bonds to finance construction of power projects. When the projects were terminated prior to completion, litigation was brought to determine the obligations of various public entities to repay those bonds. In 1983 the Washington Supreme Court determined that the participating public entities lacked authority to assume repayment obligations and the agreements to do so were void *ab initio*. The Supply System defaulted on the bonds and further litigation was brought including that before Judge Browning. While it was well under way the Washington legislature passed an amendment to the state securities law raising proof of fault applicable to municipal entities and officials from negligence to scienter except for underwriters and bond counsel who were clearly out of state litigants. The legislation did not specify retroactively and Judge Browning held in 1986 that the statute was only prospective in application. Within two weeks legislation was introduced making the amendment explicitly retroactive and it passed within a month of his ruling.

Judge Browning's April 1987 ruling held that this second statutory amendment violated the constitutional principle of separation of powers relying on *United States v. Klein*, *supra*, 80 U.S. 128 (1871), among other authorities. He found the legislature's purpose was clearly to benefit local interests at the expense of others by affecting the rule of decision in that very litigation. It was held void as applied to the cases pending before him.

Washington Public Power Supply System and the instant case are not precisely congruent, to be sure. But the underlying principle of unfairness and unconstitutionality are the same. Each reflects clear legislative intent, approved by the executive branch, to change the rules of litigation already

underway to favor their constituencies when the prior law is unfavorable. It cannot be permitted.

Consistent with this opinion an order will be entered this date reaffirming this court's February 3, 1987 rulings upon their reconsideration herein.

7/27/87
Date

/s/
PETER H. WOLF
Judge

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION ARTICLE I, SECTION 8, CLAUSE 17

The Congress shall have Power . . . To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the acceptance of Congress, become the Seat of the Government of the United States . . .

AMENDMENT V

No person shall be . . . deprived of life, liberty or property without due process of law.

AMENDMENT VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

DISTRICT OF COLUMBIA CODE SECTION 1-201

(a) Subject to the retention by Congress of the ultimate legislative authority over the nation's capital granted by article I, § 8, of the Constitution, the intent of Congress is to delegate certain legislative authority to the government of the District of Columbia; authorize the election of certain local officials by the registered qualified electors in the District of Columbia; grant to the inhabitants of the District of Columbia powers of local self-government; modernize, reorganize, and otherwise improve the governmental structure of the District of Columbia; and, to the greatest extent possible, consistent with the constitutional mandate, relieve Congress of the

burden of legislating upon essentially local District matters . . . .

DISTRICT OF COLUMBIA CODE SECTION 1-206

Notwithstanding any other provision of this Act, the Congress of the United States reserves the right, at any time, to exercise its constitutional authority as legislature for the District, by enacting legislation for the District on any subject, whether within or without the scope of the legislative power granted to the Council by this Act, including legislation to amend or repeal any law in force in the District prior to or after enactment of this Act and any act passed by the Council.

DISTRICT OF COLUMBIA CODE SECTION 12-301

Except as otherwise specifically provided by law, actions for the following purposes may not be brought after the expiration of the period specified below from the time the right to maintain the action accrues:

. . .

(3) for the recovery of damages for an injury to real or personal property—3 years;

. . .

(7) on a simple contract, express or implied—3 years;

(8) for which a limitation is not otherwise specially prescribed—3 years . . . .

DISTRICT OF COLUMBIA CODE SECTION 12-310

§ 12-310. Actions arising out of death or injury caused by defective or unsafe improvements to real property.

(a)(1) Except as provided in subsection (b), any action—

(A) to recover damages for—

(i) personal injury,

(ii) injury to real or personal property, or

(iii) wrongful death,

resulting from the defective or unsafe condition of an improvement to real property, and

(B) for contribution or indemnity which is brought as a result of such injury or death,

shall be barred unless in the case where injury is the basis of such action, such injury occurs within the ten-year period beginning on the date the improvement was substantially completed, or in the case where death is the basis of such action, either such death or injury resulting in such death occurs within such ten year period.

(2) For purposes of this subsection, an improvement to real property shall be considered substantially completed when—

(A) it is first used, or

(B) it is first available for use after having been completed in accordance with the contract or agreement covering the improvement, including any agreed changes to the contract or agreement, whichever occurs first.

(b) The limitation of actions prescribed in subsection (a) shall not apply to—

(1) any action based on a contract, express or implied, or

(2) any action brought against the person who, at the time the defective or unsafe condition of the improvement to real property caused injury or death, was the owner of or in actual possession or control of such real property.

(Oct. 27, 1972, 86 Stat. 1275, Pub L. 92-579, § 1(a); 1973 Ed., § 12-310.)

COUNCIL OF THE DISTRICT OF COLUMBIA

NOTICE

D.C. Law 6-202

"D.C. Statute of Limitations Amendment Act of 1986".

Pursuant to Section 412 of the District of Columbia Self-Government and Governmental Reorganization Act, P. L. 93-198, "the Act", the Council of the District of Columbia adopted Bill No. 6-510 on first and second readings, November 25, 1986 and December 16, 1986, respectively. Following the signature of the Mayor on January 8, 1987, this legislation was assigned Act No. 6-261, published in the January 23, 1987, edition of the D.C. Register, (Vol. 34 page 527) and transmitted to Congress on January 13, 1987 for a 30-day review, in accordance with Section 602 (c)(1) of the Act.

The Council of the District of Columbia hereby gives notice that the 30-day Congressional Review Period has expired, and therefore, cites this enactment as D.C. Law 6-202, effective February 28, 1987.

/s/ David A. Clarke
DAVID A. CLARKE
Chairman of the Council

Dates Counted During the 30-day Congressional Review period:

January 13, 14, 15, 16, 20, 21, 22, 23, 26, 27, 28, 29, 30

February 2, 3, 4, 5, 6, 9, 10, 11, 17, 18, 19, 20, 23, 24, 25, 26, 27

AN ACT
D.C. ACT 6-261

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

Jan. 8, 1987

To amend sections 12-301 and 12-310 of the District of Columbia Code to make these sections inapplicable to the District of Columbia government and to providc special limitation provisions governing actions for injury or death caused by exposure to asbestos.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "District of Columbia Statute of Limitations Amendment Act of 1986".

Sec. 2. (a) The table of contents of for title 12 is amended to read as follows:

"3. Limitation of Actions . . . . Sections 12-301 to 12-311.".

(b) The table of contents for Chapter 3 of title 12 is amended by adding the following after the heading for section 12-310:

"12-311. Actions arising out of death or injury caused by exposure to asbestos.".

Sec. 3. Section 12-310 of the District of Columbia Code is amended:

(a) By adding a new subsection (10) to read as follows:

"(10) for the recovery of damages for an injury to real property form toxic substances including products containing asbestos—5 years from the date the injury is discovered or with reasonable diligence should have been discovered.";

(b) By striking the period at the end of the last sentence and inserting in its place ", nor to actions brought by the District of Columbia government":

Sec. 4. Section 12-310 of the District of Columbia Code is amended:

(a) By striking the period after the last word of the section and inserting in its place ", or (3) any manufacturer or supplier of any equipment or machinery or other articles installed in a structure upon real property, or (4) any action brought by the District of Columbia government.".

Sec. 5. Title 12, Chapter 3 of the District of Columbia Code is amended by adding a new section 12-311, to read as follows:

"Sec. 12-311. Actions arising out of death or injury caused by exposure to asbestos.

"(a) In any civil action for injury or illness based upon exposure to asbestos, the time for the commencement of the action shall be the later of the following:

"(1) Within one year after the date the plaintiff first suffered disability; or

"(2) Within one year after the date the plaintiff either knew, or through the exercise of reasonable diligence should have known, that the disability was caused or contributed to by the exposure.

"(b) "Disability" as used in subsection (a) of this section means the loss of time from work as a result of the exposure that precludes the performance of the employee's regular occupation.

"(c) In an action for the wrongful death of any plaintiff's decedent, based upon exposure to asbestos, the time for commencement of an action shall be the later of the following:

"(1) Within one year from the date of the death of the plaintiff's decedent; or

"(2) Within one year from the date the plaintiff first knew, or through the exercise of reasonable diligence should have known, that the death was caused or contributed to by the exposure.".

Sec. 6. This action shall apply to actions pending in a court on July 1, 1986, and to actions filed in a court after July 1, 1986.

Sec. 7. This act shall take effect after a 30-day period of Congressional review following approval by the Mayor (or in the event of veto by the Mayor, action by the Council of the District of Columbia to override the veto) as provided in section 602(c)(1) of the District of Columbia Self-Government and Governmental Reorganization Act, approved December 24, 1973 (87 Stat. 813; D.C. Code, sec. 1-233(c)(1)).

/s/ David A. Clarke
Chairman
Council of the District of Columbia

/s/ Marion Barry
Mayor
District of Columbia

Approved: 1-8-87

No. 89-1890

In The

Supreme Court of the United States

OCTOBER TERM, 1989

OWENS-CORNING FIBERGLAS CORP., *et al.*,
Petitioners,

v.

DISTRICT OF COLUMBIA,
Respondent.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

BRIEF IN OPPOSITION BY THE DISTRICT OF COLUMBIA

HERBERT O. REID, SR.,
Corporation Counsel

CHARLES L. REISCHEL,
Deputy Corporation Counsel,
Appellate Division

*LUTZ ALEXANDER PRAGER,
Assistant Deputy Corporation Counsel

Office of the Corporation Counsel
Room 305, District Building
Washington, D.C. 20004
Telephone: (202) 727-6252

**Counsel of Record*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

OTHER AUTHORITIES

No. 89-1890

In The

Supreme Court of the United States

OCTOBER TERM, 1989

OWENS-CORNING FIBERGLAS CORP., *et al.*,
Petitioners,

v.

DISTRICT OF COLUMBIA,
Respondent.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

BRIEF IN OPPOSITION BY THE DISTRICT OF COLUMBIA

OPINION BELOW

The District of Columbia Court of Appeals opinion, A. 1a-32a, as modified on rehearing, A. 33a-34a, is reported at 572 A.2d 394.

STATEMENT

On interlocutory appeal, the District of Columbia Court of Appeals held that the District of Columbia enjoys limited immunity from its own statutes of limitations when performing public, as opposed to proprietary, functions. In

reaching that holding, the court followed its own precedent and a "general rule" of modern common law. See A. 15a, 18a & n. 20, 19a & n. 22. The court carefully examined this Court's precedent, including *Guaranty Trust Co. v. United States*, 304 U.S. 126, 132 (1938), and *Metropolitan Railroad Co. v. District of Columbia*, 132 U.S. 1 (1889), and concluded that its own holding was compatible with precedent. A. 14a-15a, 19a. Applying current common law, the court held that removal of asbestos from schools, hospitals, libraries, prisons, public housing, and other public buildings in order to protect the health of the public using those buildings is a public function. A. 26a.

1. The District of Columbia brought this civil action in December, 1984, against thirty-seven manufacturers and distributors of asbestos products whose products were installed in approximately 2400 District schools, libraries, hospitals, housing, prisons, and other public buildings. The District's suit is for damages to recover the costs of asbestos removal and other costs generated by the government's unwitting use of an inherently lethal substance.

The District's complaint alleges that, although asbestos manufacturers have long known of asbestos' insidious effects, they conspiratorially suppressed that information and deliberately misrepresented asbestos' effects on health. Alternatively, the complaint alleges that, if the manufacturers were not fully aware of asbestos' carcinogenic and toxic qualities, they were negligent in testing it; in failing to recall it when its dangers became known (or should have become known); and in omitting warnings and instructions from their products.

The asbestos manufacturers moved for partial summary judgment, asserting that the District's claims were largely

barred by two statutes of limitations, D.C. Code § 12-301 (1981) and D.C. Code § 12-310 (1981).[1]

The trial court dismissed about 80 per cent of the District's claims. Relying on *Metropolitan Railroad*, the court held that statutes of limitations apply to the District. A. 35a, 41a. According to the court, D.C. Code § 12-301 prevented the District from obtaining damages for injury caused by asbestos products installed in each public building before January 17, 1980, if the District was aware that asbestos

---

[1] D.C. Code § 12-301 (1981), at the time the litigation began, provided:

> Except as otherwise specifically provided by law, actions for the following purposes may not be brought after the expiration of the period specified below from the time the right to maintain the action accrues:
>
> * * *
>
> (3) for the recovery of damages for an injury to real or personal property—3 years;
>
> * * *
>
> (8) for which a limitation is not otherwise specially prescribed--3 years.
>
> * * *

D.C. Code § 12-310 (1981), at the time the complaint was filed, provided:

> (a)(1) Except as provided in subsection (b), any action—
>
> (A) to recover damages for—
>
> * * *
>
> (ii) injury to real or personal property, * * *
>
> resulting from the defective or unsafe condition of an improvement to real property and
>
> (B) for contribution or indemnity which is brought as a result of such injury * * *,
>
> shall be barred unless in the case where injury is the basis of such action, such injury occurs within the ten-year period beginning on the date the improvement was substantially completed * * *.
>
> (2) For purposes of this subsection, an improvement to real property shall be considered substantially completed when—
>
> (A) it is first used, or
>
> (B) it is first available for use after having been completed in accordance with the contract or agreement covering

(Footnote 1 continued on next page)

had been installed in that building. A. 39a. Under D.C. Code §12-310, the District could not recover damages for asbestos products installed before January 17, 1970, if the District was *un*aware that the building contained asbestos. A. 43a.

The court's holdings were issued about a month after the Council of the District of Columbia had amended both D.C. Code § 12-301 and § 12-310 and two weeks before the period of congressional review ended without congressional action.[2] The amendments extend the limitations period in § 12-301 for injuries to persons and property caused by toxic substances, including asbestos. They exclude manufacturers and suppliers from the protection of § 12-310. A. 60a-62a. They also immunize the District of Columbia from both statutes irrespective of whether the District sues in a governmental or proprietary capacity. *Id.* The amendments are expressly applicable to all actions pending in court as of July 1, 1986. *Id.*

In response to a District motion for reconsideration, the trial court held that the amending law, D.C. Law 6-202, 34 D.C. Reg. 527, 1985 (1987), could not constitutionally be applied in this litigation. A. 44a-55a. The court permitted the District to apply to the Court of Appeals for interlocutory review of its statute of limitations holdings over manufacturer objections that review should be limited to D.C. Law

---

(Footnote 1 continued)

> the improvement, including any agreed changes to the contract or agreement,
>
> whichever occurs first.
>
> (b) The limitation of actions prescribed in subsection (a) shall not apply to—
>
> (1) any action based on a contract, express or implied, or
>
> (2) any action brought against the person who, at the time the defective or unsafe condition of the improvement to real property caused injury * * *, was the owner of or in actual possession or control of such real property.

[2] District of Columbia Self-Government and Governmental Reorganization Act of 1973, §602, Pub. L. 93-198, 87 Stat. 774, *as amended*, D.C. Code § 1-233(c)(1)(1987 repl.)

6-202. The Court of Appeals granted interlocutory review over similar objections.

2. The Court of Appeals held that the District of Columbia is not subject to the limitations periods specified by §§ 12-301 and -310, except when suing in a proprietary capacity. A. 1a-32a. District removal of asbestos from schools hospitals, libraries, prisons, housing, and other public buildings in order to protect the public health, the court held, is a public function: "Unquestionably, the public at large has a profound interest in the elimination of a danger so extreme and widespread." A. 26a. Because these two holdings were sufficient to reinstate all of the District's claims, the court declined to reach issues involving D.C. Law 6-202. A. 5a-6a.

The Court of Appeals explained that the District is not subject to time limits when suing to vindicate public rights. The common law doctrine of *nullum tempus occurrit regi,* in its modern form, is available to the District for the same reasons that it is available to governments generally:

> the rule expresses a legitimate public policy of preserving " 'public rights, revenues, and property from injury and loss, by the negligence of public officers. And though this is sometimes called a prerogative right, it is in fact nothing more than a reservation, or exception, introduced for the public benefit, and equally applicable to *all* governments.' "

A. 14a, *quoting Guaranty Trust Co. v. United States, supra,* 304 U.S. at 132, and *United States v. Hoar,* 26 Fed. Cas. 329, 330 (C.C. Mass. 1821)(emphasis added). The Court of Appeals stated that the policy of protecting the law giver has been "reunited with more democratic principles, for it [has been] recognized that the people, as sovereign, are entitled to immunity from government functionaries' lax prosecution of public rights." A. 14a-15a & n. 15. The contemporary formulation of the common law doctrine, the Court of Appeals wrote, is functional, adapted by courts to modern government, not "as a mere legal inheritance," A. 21a, but to serve the doctrine's underlying justification: "defense of

the public interest and public fisc from the negligence of the government's agents." *Id.*

The Court of Appeals noted that the District was not claiming to be sovereign or quasi-sovereign but to be exempt from statutes of limitations "solely in connection with public functions delegated to it * * *." A. 16a. Not only was such immunity not foreclosed by *Metropolitan Railroad,* A. 15a-16a, it was now the rule rather than the exception that "when a municipality performs a public function, it enjoys legal immunity from the running of time." A. 18a-19a & nn. 20 & 22, *citing* to decisions in nineteen jurisdictions and to 17 E. McQuillin, MUNICIPAL CORPORATIONS (1982 & 1988 supp.) § 49.06. As a result, the Court of Appeals concluded, "we * * * hold that in its municipal capacity, the District enjoys a common-law immunity" from statutes of limitations. A. 20a.

The court denied rehearing *en banc,* no judge having called for a vote on the manufacturers' petition. A. 34a.[3]

REASONS FOR DENYING THE WRIT

1. There Is No Significant Federal Interest in the Court of Appeals' Interlocutory Decision.

This Court does not generally review District of Columbia decisions that have a purely local effect and touch no federal interest: "This Court has long expressed its reluctance to review decisions of the courts of the District involving matters of peculiarly local concern, absent a constitutional claim or a problem of general federal law of nationwide application." *Pernell v. Southall Realty,* 416 U.S. 363, 366 (1974); *see also Griffin v. United States,* 336 U.S. 704, 716-717, 719 (1949)(principle applied to criminal cases under the D.C. Code prosecuted in the name of the United States); *Key v. Doyle,* 434 U.S. 59 (1977)(dismissing appeal, under

[3] The hearing panel amended its opinion to add a note that the opinion was restricted to the "preliminary issue of the timeliness of the suit." A. 34a. *See* discussion, below, at 13-14.

former 28 U.S.C. 1257(1), from holding that local congressional statute was unconstitutional and denying certiorari; local statute enacted by Congress but limited to the District is not a "statute of the United States").

Although the Court has noted that its deference to the Court of Appeals as "the highest court" of the District[4] is a matter of policy rather than power, *Whalen v. United States*, 445 U.S. 684, 687 (1980), there is no reason for deviating from that policy here.[5] The statutes of limitations and the District's immunities are matters of purely local law. Other jurisdictions are wholly unaffected by the Court of Appeals' holding. No nonfrivolous constitutional issues are at stake. *See, generally, Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988)(Kansas' application of its statute of limitations to claims governed by the substantive law of other states does not implicate Full Faith and Credit or Due Process Clauses). Even as a local matter, the Court of Appeals' decision has little or no relevance beyond the present litigation in light of enactment of D.C. Law 6-202.[6]

2. The Court of Appeals' Decision Is Not Foreclosed By *Metropolitan Railroad* and Is a Reasonable Expression of the District of Columbia's Common Law.

Metropolitan Railroad is not a bar to refinements in the common law.

---

[4] Act of Jul. 29, 1970, Pub. L. 91-358, 84 Stat. 475, §111, D.C. Code §11-102 (1989 repl.)("The highest court of the District of Columbia is the District of Columbia Court of Appeals. * * *").

[5] In *Whalen*, the Court deviated from its normal policy because the petition's constitutional claim "cannot be separated entirely from a resolution of the question of statutory construction." 445 U.S. at 688.

[6] The Court's normal deference to Court of Appeals' constructions of local law should have added force here, where the Court of Appeals' decision originates in an interlocutory appeal; raises no federal issues; and

(Footnote 6 continued on next page)

a. In *Metropolitan Railroad,* the Court, applying its understanding of common law prevailing a century ago, held that the District would not ordinarily be immune from statutes of limitations because it lacked sovereignty. In reaching that conclusion, the Court applied the common law doctrine, *nullum tempus,*[7] as it existed a century ago. Required to entertain direct appeals from the local court on purely local questions, the Court was necessarily the final expositor of local common law.[8] When the Court decided *Metropolitan Railroad,* therefore, it examined treatises and decisions describing the common law in other jurisdictions. *See* 132 U.S. at 11. Based on its survey of prevailing nineteenth-century jurisprudence, the Court concluded that, because municipalities were not sovereign, they were not qenerally immune from statutes of limitations.

Even at the time, however, the restriction of the immunity to sovereign governments was being questioned. One of the treatises on which the Court relied noted that some jurisdictions had held that "the maxim *[n]ullum tempus occurrit regi* is not restricted in its applications to sovereignty, but that it applies to municipal corporations as trustees

---

(Footnote 6 continued)

can be reviewed after final judgment. *Pennsylvania v. Ritchie,* 480 U.S. 39, 47 (1987)(normally, "finality" requirement of 28 U.S.C. 1257 (1982) is not satisfied if state courts must conduct further substantive proceedings); *Market Street R. Co. v. Railroad Commission of California,* 324 U.S. 548, 551 (1945)(same).

[7] See 10 W. Holdsworth HISTORY OF ENGLISH LAW (1938) 355.

[8] When *Metropolitan Railroad* was decided a century ago, the Court had no power to select among District of Columbia decisions. The Supreme Court of the District of Columbia was a federal court with the "same powers and jurisdiction as the circuit courts of the United States." Rev. Stat., D.C., § 760 (1875). This Court was obligated to review all circuit court and local court decisions over a specified jurisdictional amount. Rev. Stat. § 692 (1878); Rev. Stat., D.C., § 846 (1875). In 1889, the jurisdictional amount for Supreme Court of the District of Columbia cases was $5000. Act of Mar. 3, 1885, 23 Stat. 443, ch. 355. *Metropolitan Railroad* required construction of a Maryland statute. *See* 132 U.S. at 11, *construing* 1 Kilty, Laws, 1715, ch. 23.

of the rights of the public." 2 J.F. Dillon, LAW OF MUNICIPAL CORPORATIONS (1881) § 674 at 672.[9]

Aware of this precedent, the *Metropolitan Railroad* Court expressly declined to decide whether a limitations defense could be asserted against the District if it were suing in furtherance of certain governmental functions, such as control of public property for public purposes and abatement of public nuisances. *Metropolitan Railroad*, 132 U.S. at 11, *quoted* at A. 16a. *Metropolitan Railroad* thereby suggested that, while the District would not be immune from general statutes of limitations because of the District's status as a non-sovereign municipality, it might be immune when performing *functions* peculiar to government. *Id.*[10]

Protection of the public health is a quintessential government function, especially in public buildings such as schools, hospitals, libraries, prisons, and public housing.[11] The District

[9] Judge Dillon also wrote: "The author cannot assent to the doctrine that, as respects public rights, municipal corporations are within ordinary limitation statutes. It is unsafe to recognize such a principle." 2 J.F. Dillon, LAW OF MUNICIPAL CORPORATIONS (1881) § 675 at 674.

[10] The petition argues (at 15) that Congress never gave the District general immunity from statutes of limitations. That is true; it simply means that Congress was content with letting judicial interpretations fill *Metropolitan Railroad*'s gaps. The petition's citation to D.C. Code § 12-308 (1989 repl.), which gives the United States immunity from local congressional statutes of limitations, adds nothing to the argument. Congress clearly can make the United States subject to congressional statutes of limitations, *see* 28 U.S.C. 2415 (1982); *United States v. John Hancock Mutual Life Insurance Co.*, 364 U.S. 301, 306 (1960). It is therefore likely that § 12-308, was designed to safeguard the United States' ability—under all circumstances—to sue without regard to congressionally-enacted local statutes of limitations. By contrast, Congress apparently preferred to leave the District's immunity to line-drawing by the judiciary, depending on the nature of the suit. When Congress expressly wished to prevent statutes of limitations from applying to the District because the governmental activity appeared to be *proprietary*, it legislated. *See* D.C. Code §§ 7-515 and -1415 (1989 repl.)(no limitations apply to District's efforts to obtain reimbursement from railroads for District-built rail crossings).

[11] The District government has long been delegated a general duty by Congress to protect the public health in the District, Rev. Stat., D.C., § 335,

(Footnote 11 continued on next page)

here sued to remove noxious impediments to unhampered public use of public property. Government litigation to recover full use of public property falls within the ambit of the issue deliberately left open by *Metropolitan Railroad. Id.*

Given *Metropolitan Railroad*'s refusal to decide whether the District can be immune from local statutes of limitations under all circumstances, the Court of Appeals looked at modern common law developments and concluded that it would be irrational to subject the District to general statutes of limitations when the District is acting in the role peculiar to representative government—protection of the public interest. A. 21a. Since the District has been given full responsibility for protecting the public health and safety of its citizens, "to hold that legal immunity resides in the actor rather than the act would divorce the principle from its purpose. It would expose the citizenry of the District, unlike the citizens of any other United States jurisdiction, to hazard without redress." *Id.*

b. This Court recognizes that the common law is not frozen in time, but is an evolving body of law, to be adapted to changed conditions and times. *Funk v. United States,* 290

(Footnote 11 continued

D.C. Code § 4-115 (1988 repl.)("It shall be the duty of the Mayor * * * at all times of the day or night * * * (4) To guard the public health[.]") The government is also empowered to abate conditions in buildings and on land that it determines are harmful to public health: the "existence on any lot or parcel of land * * * of * * * materials * * * of any kind * * * insofar as they affect the public health, comfort, safety, and welfare" is a public nuisance. Act of Mar. 1, 1899, § 2, 30 Stat. 923, *as amended,* D.C. Code § 5-604(a)(1988 repl.)

Besides the obligations imposed by local law, the District is treated as a state by national legislation and is obligated to inspect and abate asbestos in its public schools. See Pub. L. 94-469, Title II, 90 Stat. 2003, *as amended by* Pub. L. 99-519, 100 Stat. 2970, 15 U.S.C. 2641 *et seq.* (1988); Pub. L. 96-270, 94 Stat. 487, 20 U.S.C. 3601 *et seq.* (1988); Pub. L. 98-377, Title V, 98 Stat. 1287, 20 U.S.C. 4011 *et seq.* (1988).

U.S. 371, 382-386 (1933);[12] *Colgrove v. Battin*, 413 U.S. 149, 156-157 (1973). Courts in the District of Columbia have long adopted this principle as well. *Linkins v. Protestant Episcopal Cathedral Foundation*, 87 U.S. App. D.C. 351, 354-55, 187 F.2d 357, 360-61 (1950).

The precedential underpinnings of the Court's 1889 analysis in *Metropolitan Railroad* have eroded over the century, most notably by the Court's own more recent formulations of the *nullum tempus* doctrine. In the intervening century, the Court has focussed on the underlying purpose of the doctrine rather than on metaphysical attributes of sovereignty. In *Guaranty Trust Co. v. United States, supra*, 304 U.S. at 132, the Court emphasized that the policy of protecting the public from injury and loss, rather than antiquated concepts of "sovereignty," provides the basis for governmental immunity:

> Regardless of the form of government and independently of the royal prerogative once thought sufficient to justify it, the rule is supportable now because its benefit and advantage extend to every citizen, including the defendant, whose plea of laches or limitations it precludes; and its uniform survival in the United States has been generally accounted for and justified on grounds of policy rather than upon any inherited notions of the personal privilege of the king.

---

[12] In *Funk*, the Court wrote:

> To concede this capacity for growth and change in the common law by drawing "its inspiration from every fountain of justice," and at the same time to say that the courts of this country are forever bound to perpetuate such of its rules as, by every reasonable test, are found to be neither wise nor just, because we have once adopted them as suited to our situation and institutions at a particular time, is to deny to the common law in the place of its adoption a "flexibility and capacity for growth and adaptation" which was "the peculiar boast and excellence" of the system in the place of its origin.

290 U.S. at 383.

Id. at 132. Indeed, long before *Guaranty Trust*, the Court held that *non*-sovereign governments entrusted with broad grants of legislative authority are also *absolutely* immune from statutes of limitations. *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907) (territory of Hawaii not subject to statutes of limitations).[13]

Unlike a century ago, most jurisdictions now hold that statutes of limitations do not apply to municipalities exercising governmental, as opposed to proprietary, functions.[14] Thus, not only does the uniformity of law that existed in 1889 no longer persist, general common law itself has evolved to the point where most jurisdictions now hold that municipalities performing uniquely public functions are immune from statutes of limitations.

The Court of Appeals has power to modify the common law. It is statutorily defined as "[t]he highest court of the District of Columbia." See n. 4, above, at 7. As such, it

---

[13] The Court of Appeals' holding is consistent with the *Kawananakoa* reformulation of the *nullum tempus* doctrine for non-sovereign entities. In *Kawananakoa*, the Court distinguished the Territory of Hawaii from the District because Hawaii's organic act made the territory the principal lawmaker. By contrast, in the 1907 District, "the body of private rights is created and controlled by Congress and not by a legislature of the District." 205 U.S. at 354. Since 1973, however, the District's legislative powers have closely resembled those of 1907 Hawaii. *Compare* D.C. Home Rule Act, §§102(a), 302, Pub. L. 93-198, 87 Stat. 777 (1973), D.C. Code §§1-201, -204 (1987 repl.)(legislative power of the District extends "to all rightful subjects of legislation" with specified exceptions), *with* §55, Act of Apr. 30, 1900, 31 Stat. 141, 142, ch. 339. *See also In re Hooper's Estate*, 359 F.2d 569, 578 (3d Cir. 1966)(Virgin Islands not subject to statutes of limitations; while not sovereign, territory has attributes of autonomy similar to those of a sovereign; immunity is based on public policy articulated in *Guaranty Trust*).

[14] In addition to the decisions cited at A. 18a, n. 20, *see Board of Education v. A, C & S, Inc.*, 131 Ill. 2d 428, 546 N.E.2d 580, 601-603 (1989)(Chicago school district is not subject to statutes of limitations when suing to recover costs of removing asbestos from schools); *Oklahoma Municipal Improvement Authority v. HBT, Inc.*, 769 P.2d 131, 133-35 (Okla. 1989)(city agencies not bound by statutes of limitations when suing to recover costs incurred in repairing municipal water system).

is now the primary (if not exclusive) expositor of local common law and can legitimately take into account changes in decisional law around the country. In the present case, however, the Court of Appeals made no changes to prevailing law. Rather, it gave a full explanation of why it chose not to retreat from the decisional law adopted by the court almost twenty years ago in *District of Columbia v. Weis*, 263 A.2d 638, 639 (D.C. 1970), and thirty years ago in *Stonewall Construction Co. v. McLaughlin*, 151 A.2d 535, 536 (D.C. 1959). *See* A. 16a-17a.

In short, the decision is not foreclosed by *Metropolitan Railroad*; is consistent with this Court's decisions in this century; follows the prevailing view in jurisdictions throughout the United States; and reaffirms local common law as developed in recent decades.

3. The Court of Appeals' Decision on the Threshold Issue of the Manufacturers' Limitations Defense Does Not Violate Super. Ct. Civ. R. 56 or the Seventh Amendment.

The Court of Appeals' holding, that ridding public buildings of materials reasonably thought to endanger public health is a governmental function, is a legal conclusion that deprived the asbestos manufacturers of no rights under local rules of procedure or under the Constitution. The petition's arguments to the contrary (pet. at 17-19) are plainly frivolous.

a. In procedural terms, the Court of Appeals' holding is simply that partial summary judgment should not have been entered against the District. That interlocutory holding "decides only one thing—that the case should go to trial." *Switzerland Cheese Ass'n, Inc. v. E. Horne's Market, Inc.*, 385 U.S. 23, 25 (1966).

b. The Court of Appeals' holding does not affect defenses other than the limitations defense or prevent a jury trial on any disputed factual issue. The Court of Appeals expressly held that its discussion of the potential dangers of asbestos

was solely "in support of our holding that the District has brought this lawsuit in the objectively good faith belief that it is necessary to vindicate a public right." A. 34a. Other than resolving the manufacturers' threshold limitations defense, all issues are "to be resolved at trial uninfluenced by anything that this court has stated in addressing the preliminary issue of the timeliness of the suit." *Id.*

c. The Court of Appeals' holding that removal of potential health hazards from schools, hospitals, libraries, prisons, and public housing is a public function is a legal conclusion, not a factual determination. *See, e.g., Rowan County Board of Education v. United States Gypsum Co.*, 87 N.C. App. 106, 359 S.E.2d 814, 819 (1987), *rev. denied*, 321 N.C. 298, 362 S.E.2d 782 (1987) (holding, on asbestos manufacturers' motion for summary judgment, that removal of asbestos as potential health hazard, is governmental function); *Board of Education v. A, C & S, Inc.*, 131 Ill. 2d 428, 546 N.E.2d 580, 601-603 (1989)(same holding on motion to dismiss). The Court of Appeals' exploration of literature, case law, and federal laws and regulations (A. 6a-8a) was designed to assure itself that the District's claim that its actions furthered the public health had a rational foundation. At trial, of course, the District retains the burden of proof to show that the claimed danger to the public is real; petitioners are responsible for the danger; and the harm is compensable. In short, the manufacturers' procedural rights remain fully intact.

4. No "Vested" Rights Are Affected by the Court of Appeals' Holding.

The petition's contention that the Court of Appeals' adherence to its own decades-old precedent deprived the manufacurers of "vested" rights (pet. at 19) is also frivolous.

a. This Court has held that protections afforded by statutes of limitations are not normally vested rights. *International Union of Electrical Workers v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976); *Chase Securities Corp. v.*

Donaldson, 325 U.S. 304, 313-316 (1945); *Campbell v. Holt*, 115 U.S. 620, 628-630 (1885).

b. Here, moreover, since at least 1970, in *Weis*, the Court of Appeals has held that the District was not subject to statutes of limitations when suing to protect the public health. *See* above, at 13. That decision was issued two years before enactment of D.C. Code § 12-310. Potential defendants were therefore on notice that D.C. Code § 12-310 might be construed as not applying to government litigation when the District was suing to vindicate public rights and that their ability to be free from suit might never "vest."

c. There is no basis for a doctrinal distinction between §§ 12-301 and -310 in the circumstances of this case, for reasons elaborated below. The statutes differ only by using different mechanisms for triggering the running of their time limits. In *Sandoe v. Lefta Associates*, 559 A.2d 732, 736 n. 5 (D.C. 1989), the Court of Appeals distinguished them by stating that time limits in § 12-301 are triggered by accrual of a cause of action while time limits in § 12-310 are triggered by events unrelated to the cause of action, such as completion of a building. The court called § 12-310 a "statute of repose." *Id.*

i. The Court of Appeals could reasonably hold that differences in the triggering mechanisms for starting the running of time do not determine whether government is to be subject to time limits when suing in the public interest. *See Bellevue School District v. Brazier Construction Co.*, 103 Wash. 2d 111, 691 P.2d 178, 183-84 (1984)(no reason to treat statutes of repose [such as § 12-310] differently from statutes of limitations in *nullum tempus* analysis); *Regents v. Hartford Accident & Indemnity Co.*, 21 Cal. 3d 624, 147 Cal. Rptr. 486, 495-96, 581 P.2d 197, 206-207 (1978)(no significant distinctions should be made between statutes of limitations and repose).

ii. Although the manufacturers assert that § 12-310 creates a "substantive" right, the "procedural"-"substantive"

dichotomy for time limits has been largely discounted in this Court's modern jurisprudence: "Except at the extremes, the terms 'substance' and 'procedure' precisely describe very little except a dichotomy, and what they mean is * * * largely determined by the purposes for which the dichotomy is drawn." *Sun Oil Co. v. Wortman, supra,* 486 U.S. at 726 (Full Faith and Credit and Due Process Clauses do not require forum state to apply other states' time limits); *Wells v. Simonds Abrasive Co.,* 345 U.S. 514, 516-518 (1953)(forum may treat "substantive" time limits of other states as "procedural"); *see also Beard v. J.I. Case Co.,* 823 F.2d 1095 (7th Cir. 1987)(refusing to apply expired Tennessee statute of repose in diversity suit brought in Wisconsin); *Wesley Theological Seminary v. U.S. Gypsum Co.,* 277 U.S. App. D.C. 360, 363-364, 876 F.2d 119, 122-123 (1989), *cert. denied,* 58 U.S.L.W. 3545, 108 L. Ed. 2d 473, 110 S. Ct. 1296 (1989) (upholding constitutionality of D.C. Law 6-202; distinction between statutes of limitations and statutes of repose is "somewhat metaphysical").

iii. In particular, there is no principled doctrinal basis for distinguishing time limits in statutes of repose from time limits in statutes of limitations when, as here, the government's cause of action actually accrued within the time limits of the statute of repose but the injury was first discovered after the time period had expired. Because asbestos is inherently dangerous, the District's cause of action against the manufacturers accrued as soon as their products were installed in government-owned buildings. In other words, the wrong was committed and the injury occurred upon installation, well within the ten-year time limit specified by D.C. Code § 12-310. The District did not sue at that time, however, because it had discovered neither the wrong nor its injury.[15]

---

[15] In the District of Columbia, the discovery rule normally tolls statutes of limitations until the wrong or injury is discovered. *Bussineau v. President, etc., of Georgetown College,* 518 A.2d 423, 425, 428 (D.C. 1986).

When injury occurs (and a cause of action accrues) within the limits set by a statute of repose but is discovered later, its time limits do not apply to the government. In *Oklahoma City Municipal Improvement Authority v. HBT, Inc., supra*, 769 P.2d at 131, the court held that the statute of repose did not apply to a municipal agency suing to recover damages caused by negligent design of part of a municipal water system. Noting that the design failure had occurred within the time limits of the statute of repose, the court wrote (*id.*, at 137):

> [S]ince plaintiffs' initial right of action accrued and vested within the prescribed time period, the statute governs in this case not the substantive issue of the existence of a right, but the procedural aspect of the availability of a remedy. Once a cause of action arises, applicable statutes of limitation begin to operate placing a limit on the plaintiff's availability of remedy. Since plaintiff[']s initial cause of action arose and vested during the ten year period prescribed by [the repose] law, public policy compels us to adhere to the general rule that public rights should not be prejudiced by the tardiness of officials to whom those rights are entrusted.

The government's immunity from time limits is designed to safeguard "public rights, revenues, and property from injury or loss, by the negligence of public officers." *Guaranty Trust Co. v. United States, supra*, 304 U.S. at 132, and *United States v. Hoar, supra*, 26 Fed. Cas. at 330. That purpose is furthered by the Court of Appeals' holding that the time limit in a statute of repose does not apply to the government, suing in the public's interest, when, as here, timely suit is thwarted only because information about a public health hazard has been deliberately and conspiratorially withheld from the government and the public.

CONCLUSION

The petition should be denied.

Respectfully submitted.

HERBERT O. REID, SR.,
Corporation Counsel

CHARLES L. REISCHEL,
Deputy Corporation Counsel,
Appellate Division

*LUTZ ALEXANDER PRAGER,
Assistant Deputy Corporation Counsel

Office of the Corporation Counsel
Room 305, District Building
Washington, D.C. 20004
Telephone: (202) 727-6252

**Counsel of Record*

AUGUST, 1990

the public interest and public fisc from the negligence of the government's agents." *Id.*

The Court of Appeals noted that the District was not claiming to be sovereign or quasi-sovereign but to be exempt from statutes of limitations "solely in connection with public functions delegated to it * * *." A. 16a. Not only was such immunity not foreclosed by *Metropolitan Railroad,* A. 15a-16a, it was now the rule rather than the exception that "when a municipality performs a public function, it enjoys legal immunity from the running of time." A. 18a-19a & nn. 20 & 22, *citing* to decisions in nineteen jurisdictions and to 17 E. McQuillin, MUNICIPAL CORPORATIONS (1982 & 1988 supp.) § 49.06. As a result, the Court of Appeals concluded, "we * * * hold that in its municipal capacity, the District enjoys a common-law immunity" from statutes of limitations. A. 20a.

The court denied rehearing *en banc,* no judge having called for a vote on the manufacturers' petition. A. 34a.[3]

REASONS FOR DENYING THE WRIT

1. There Is No Significant Federal Interest in the Court of Appeals' Interlocutory Decision.

This Court does not generally review District of Columbia decisions that have a purely local effect and touch no federal interest: "This Court has long expressed its reluctance to review decisions of the courts of the District involving matters of peculiarly local concern, absent a constitutional claim or a problem of general federal law of nationwide application." *Pernell v. Southall Realty,* 416 U.S. 363, 366 (1974); *see also Griffin v. United States,* 336 U.S. 704, 716-717, 719 (1949)(principle applied to criminal cases under the D.C. Code prosecuted in the name of the United States); *Key v. Doyle,* 434 U.S. 59 (1977)(dismissing appeal, under

[3] The hearing panel amended its opinion to add a note that the opinion was restricted to the "preliminary issue of the timeliness of the suit." A. 34a. *See* discussion, below, at 13-14.

former 28 U.S.C. 1257(1), from holding that local congressional statute was unconstitutional and denying certiorari; local statute enacted by Congress but limited to the District is not a "statute of the United States").

Although the Court has noted that its deference to the Court of Appeals as "the highest court" of the District[4] is a matter of policy rather than power, *Whalen v. United States*, 445 U.S. 684, 687 (1980), there is no reason for deviating from that policy here.[5] The statutes of limitations and the District's immunities are matters of purely local law. Other jurisdictions are wholly unaffected by the Court of Appeals' holding. No nonfrivolous constitutional issues are at stake. *See, generally, Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988)(Kansas' application of its statute of limitations to claims governed by the substantive law of other states does not implicate Full Faith and Credit or Due Process Clauses). Even as a local matter, the Court of Appeals' decision has little or no relevance beyond the present litigation in light of enactment of D.C. Law 6-202.[6]

2. The Court of Appeals' Decision Is Not Foreclosed By *Metropolitan Railroad* and Is a Reasonable Expression of the District of Columbia's Common Law.

Metropolitan Railroad is not a bar to refinements in the common law.

---

[4] Act of Jul. 29, 1970, Pub. L. 91-358, 84 Stat. 475, § 111, D.C. Code § 11-102 (1989 repl.)("The highest court of the District of Columbia is the District of Columbia Court of Appeals. * * *").

[5] In *Whalen*, the Court deviated from its normal policy because the petition's constitutional claim "cannot be separated entirely from a resolution of the question of statutory construction." 445 U.S. at 688.

[6] The Court's normal deference to Court of Appeals' constructions of local law should have added force here, where the Court of Appeals' decision originates in an interlocutory appeal; raises no federal issues; and

(Footnote 6 continued on next page)

a. In *Metropolitan Railroad,* the Court, applying its understanding of common law prevailing a century ago, held that the District would not ordinarily be immune from statutes of limitations because it lacked sovereignty. In reaching that conclusion, the Court applied the common law doctrine, *nullum tempus,*[7] as it existed a century ago. Required to entertain direct appeals from the local court on purely local questions, the Court was necessarily the final expositor of local common law.[8] When the Court decided *Metropolitan Railroad,* therefore, it examined treatises and decisions describing the common law in other jurisdictions. *See* 132 U.S. at 11. Based on its survey of prevailing nineteenth-century jurisprudence, the Court concluded that, because municipalities were not sovereign, they were not qenerally immune from statutes of limitations.

Even at the time, however, the restriction of the immunity to sovereign governments was being questioned. One of the treatises on which the Court relied noted that some jurisdictions had held that "the maxim *[n]ullum tempus occurrit regi* is not restricted in its applications to sovereignty, but that it applies to municipal corporations as trustees

---

(Footnote 6 continued)

can be reviewed after final judgment. *Pennsylvania v. Ritchie,* 480 U.S. 39, 47 (1987)(normally, "finality" requirement of 28 U.S.C. 1257 (1982) is not satisfied if state courts must conduct further substantive proceedings); *Market Street R. Co. v. Railroad Commission of California,* 324 U.S. 548, 551 (1945)(same).

[7] See 10 W. Holdsworth HISTORY OF ENGLISH LAW (1938) 355.

[8] When *Metropolitan Railroad* was decided a century ago, the Court had no power to select among District of Columbia decisions. The Supreme Court of the District of Columbia was a federal court with the "same powers and jurisdiction as the circuit courts of the United States." Rev. Stat., D.C., § 760 (1875). This Court was obligated to review all circuit court and local court decisions over a specified jurisdictional amount. Rev. Stat. § 692 (1878); Rev. Stat., D.C., § 846 (1875). In 1889, the jurisdictional amount for Supreme Court of the District of Columbia cases was $5000. Act of Mar. 3, 1885, 23 Stat. 443, ch. 355. *Metropolitan Railroad* required construction of a Maryland statute. *See* 132 U.S. at 11, *construing* 1 Kilty, Laws, 1715, ch. 23.

of the rights of the public." 2 J.F. Dillon, LAW OF MUNICIPAL CORPORATIONS (1881) § 674 at 672.[9]

Aware of this precedent, the *Metropolitan Railroad* Court expressly declined to decide whether a limitations defense could be asserted against the District if it were suing in furtherance of certain governmental functions, such as control of public property for public purposes and abatement of public nuisances. *Metropolitan Railroad*, 132 U.S. at 11, *quoted* at A. 16a. *Metropolitan Railroad* thereby suggested that, while the District would not be immune from general statutes of limitations because of the District's status as a non-sovereign municipality, it might be immune when performing *functions* peculiar to government. *Id.*[10]

Protection of the public health is a quintessential government function, especially in public buildings such as schools, hospitals, libraries, prisons, and public housing.[11] The District

[9] Judge Dillon also wrote: "The author cannot assent to the doctrine that, as respects public rights, municipal corporations are within ordinary limitation statutes. It is unsafe to recognize such a principle." 2 J.F. Dillon, LAW OF MUNICIPAL CORPORATIONS (1881) § 675 at 674.

[10] The petition argues (at 15) that Congress never gave the District general immunity from statutes of limitations. That is true; it simply means that Congress was content with letting judicial interpretations fill *Metropolitan Railroad*'s gaps. The petition's citation to D.C. Code § 12-308 (1989 repl.), which gives the United States immunity from local congressional statutes of limitations, adds nothing to the argument. Congress clearly can make the United States subject to congressional statutes of limitations, *see* 28 U.S.C. 2415 (1982); *United States v. John Hancock Mutual Life Insurance Co.*, 364 U.S. 301, 306 (1960). It is therefore likely that § 12-308, was designed to safeguard the United States' ability—under all circumstances—to sue without regard to congressionally-enacted local statutes of limitations. By contrast, Congress apparently preferred to leave the District's immunity to line-drawing by the judiciary, depending on the nature of the suit. When Congress expressly wished to prevent statutes of limitations from applying to the District because the governmental activity appeared to be *proprietary*, it legislated. *See* D.C. Code §§ 7-515 and -1415 (1989 repl.)(no limitations apply to District's efforts to obtain reimbursement from railroads for District-built rail crossings).

[11] The District government has long been delegated a general duty by Congress to protect the public health in the District, Rev. Stat., D.C., § 335,

(Footnote 11 continued on next page)

here sued to remove noxious impediments to unhampered public use of public property. Government litigation to recover full use of public property falls within the ambit of the issue deliberately left open by *Metropolitan Railroad*. *Id.*

Given *Metropolitan Railroad*'s refusal to decide whether the District can be immune from local statutes of limitations under all circumstances, the Court of Appeals looked at modern common law developments and concluded that it would be irrational to subject the District to general statutes of limitations when the District is acting in the role peculiar to representative government—protection of the public interest. A. 21a. Since the District has been given full responsibility for protecting the public health and safety of its citizens, "to hold that legal immunity resides in the actor rather than the act would divorce the principle from its purpose. It would expose the citizenry of the District, unlike the citizens of any other United States jurisdiction, to hazard without redress." *Id.*

b. This Court recognizes that the common law is not frozen in time, but is an evolving body of law, to be adapted to changed conditions and times. *Funk v. United States*, 290

(Footnote 11 continued

D.C. Code § 4-115 (1988 repl.)("It shall be the duty of the Mayor * * * at all times of the day or night * * * (4) To guard the public health[.]") The government is also empowered to abate conditions in buildings and on land that it determines are harmful to public health: the "existence on any lot or parcel of land * * * of * * * materials * * * of any kind * * * insofar as they affect the public health, comfort, safety, and welfare" is a public nuisance. Act of Mar. 1, 1899, § 2, 30 Stat. 923, *as amended*, D.C. Code § 5-604(a)(1988 repl.)

Besides the obligations imposed by local law, the District is treated as a state by national legislation and is obligated to inspect and abate asbestos in its public schools. See Pub. L. 94-469, Title II, 90 Stat. 2003, *as amended by* Pub. L. 99-519, 100 Stat. 2970, 15 U.S.C. 2641 *et seq.* (1988); Pub. L. 96-270, 94 Stat. 487, 20 U.S.C. 3601 *et seq.* (1988); Pub. L. 98-377, Title V, 98 Stat. 1287, 20 U.S.C. 4011 *et seq.* (1988).

U.S. 371, 382-386 (1933);[12] *Colgrove v. Battin*, 413 U.S. 149, 156-157 (1973). Courts in the District of Columbia have long adopted this principle as well. *Linkins v. Protestant Episcopal Cathedral Foundation*, 87 U.S. App. D.C. 351, 354-55, 187 F.2d 357, 360-61 (1950).

The precedential underpinnings of the Court's 1889 analysis in *Metropolitan Railroad* have eroded over the century, most notably by the Court's own more recent formulations of the *nullum tempus* doctrine. In the intervening century, the Court has focussed on the underlying purpose of the doctrine rather than on metaphysical attributes of sovereignty. In *Guaranty Trust Co. v. United States, supra*, 304 U.S. at 132, the Court emphasized that the policy of protecting the public from injury and loss, rather than antiquated concepts of "sovereignty," provides the basis for governmental immunity:

> Regardless of the form of government and independently of the royal prerogative once thought sufficient to justify it, the rule is supportable now because its benefit and advantage extend to every citizen, including the defendant, whose plea of laches or limitations it precludes; and its uniform survival in the United States has been generally accounted for and justified on grounds of policy rather than upon any inherited notions of the personal privilege of the king.

---

[12] In *Funk*, the Court wrote:

> To concede this capacity for growth and change in the common law by drawing "its inspiration from every fountain of justice," and at the same time to say that the courts of this country are forever bound to perpetuate such of its rules as, by every reasonable test, are found to be neither wise nor just, because we have once adopted them as suited to our situation and institutions at a particular time, is to deny to the common law in the place of its adoption a "flexibility and capacity for growth and adaptation" which was "the peculiar boast and excellence" of the system in the place of its origin.

290 U.S. at 383.

Id. at 132. Indeed, long before *Guaranty Trust*, the Court held that *non*-sovereign governments entrusted with broad grants of legislative authority are also *absolutely* immune from statutes of limitations. *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907) (territory of Hawaii not subject to statutes of limitations).[13]

Unlike a century ago, most jurisdictions now hold that statutes of limitations do not apply to municipalities exercising governmental, as opposed to proprietary, functions.[14] Thus, not only does the uniformity of law that existed in 1889 no longer persist, general common law itself has evolved to the point where most jurisdictions now hold that municipalities performing uniquely public functions are immune from statutes of limitations.

The Court of Appeals has power to modify the common law. It is statutorily defined as "[t]he highest court of the District of Columbia." See n. 4, above, at 7. As such, it

---

[13] The Court of Appeals' holding is consistent with the *Kawananakoa* reformulation of the *nullum tempus* doctrine for non-sovereign entities. In *Kawananakoa*, the Court distinguished the Territory of Hawaii from the District because Hawaii's organic act made the territory the principal lawmaker. By contrast, in the 1907 District, "the body of private rights is created and controlled by Congress and not by a legislature of the District." 205 U.S. at 354. Since 1973, however, the District's legislative powers have closely resembled those of 1907 Hawaii. *Compare* D.C. Home Rule Act, §§102(a), 302, Pub. L. 93-198, 87 Stat. 777 (1973), D.C. Code §§1-201, -204 (1987 repl.)(legislative power of the District extends "to all rightful subjects of legislation" with specified exceptions), *with* §55, Act of Apr. 30, 1900, 31 Stat. 141, 142, ch. 339. *See also In re Hooper's Estate*, 359 F.2d 569, 578 (3d Cir. 1966)(Virgin Islands not subject to statutes of limitations; while not sovereign, territory has attributes of autonomy similar to those of a sovereign; immunity is based on public policy articulated in *Guaranty Trust*).

[14] In addition to the decisions cited at A. 18a, n. 20, *see Board of Education v. A, C & S, Inc.*, 131 Ill. 2d 428, 546 N.E.2d 580, 601-603 (1989)(Chicago school district is not subject to statutes of limitations when suing to recover costs of removing asbestos from schools); *Oklahoma Municipal Improvement Authority v. HBT, Inc.*, 769 P.2d 131, 133-35 (Okla. 1989)(city agencies not bound by statutes of limitations when suing to recover costs incurred in repairing municipal water system).

is now the primary (if not exclusive) expositor of local common law and can legitimately take into account changes in decisional law around the country. In the present case, however, the Court of Appeals made no changes to prevailing law. Rather, it gave a full explanation of why it chose not to retreat from the decisional law adopted by the court almost twenty years ago in *District of Columbia v. Weis*, 263 A.2d 638, 639 (D.C. 1970), and thirty years ago in *Stonewall Construction Co. v. McLaughlin*, 151 A.2d 535, 536 (D.C. 1959). *See* A. 16a-17a.

In short, the decision is not foreclosed by *Metropolitan Railroad*; is consistent with this Court's decisions in this century; follows the prevailing view in jurisdictions throughout the United States; and reaffirms local common law as developed in recent decades.

3. The Court of Appeals' Decision on the Threshold Issue of the Manufacturers' Limitations Defense Does Not Violate Super. Ct. Civ. R. 56 or the Seventh Amendment.

The Court of Appeals' holding, that ridding public buildings of materials reasonably thought to endanger public health is a governmental function, is a legal conclusion that deprived the asbestos manufacturers of no rights under local rules of procedure or under the Constitution. The petition's arguments to the contrary (pet. at 17-19) are plainly frivolous.

a. In procedural terms, the Court of Appeals' holding is simply that partial summary judgment should not have been entered against the District. That interlocutory holding "decides only one thing—that the case should go to trial." *Switzerland Cheese Ass'n, Inc. v. E. Horne's Market, Inc.*, 385 U.S. 23, 25 (1966).

b. The Court of Appeals' holding does not affect defenses other than the limitations defense or prevent a jury trial on any disputed factual issue. The Court of Appeals expressly held that its discussion of the potential dangers of asbestos

was solely "in support of our holding that the District has brought this lawsuit in the objectively good faith belief that it is necessary to vindicate a public right." A. 34a. Other than resolving the manufacturers' threshold limitations defense, all issues are "to be resolved at trial uninfluenced by anything that this court has stated in addressing the preliminary issue of the timeliness of the suit." *Id.*

c. The Court of Appeals' holding that removal of potential health hazards from schools, hospitals, libraries, prisons, and public housing is a public function is a legal conclusion, not a factual determination. *See, e.g., Rowan County Board of Education v. United States Gypsum Co.*, 87 N.C. App. 106, 359 S.E.2d 814, 819 (1987), *rev. denied*, 321 N.C. 298, 362 S.E.2d 782 (1987) (holding, on asbestos manufacturers' motion for summary judgment, that removal of asbestos as potential health hazard, is governmental function); *Board of Education v. A, C & S, Inc.*, 131 Ill. 2d 428, 546 N.E.2d 580, 601-603 (1989)(same holding on motion to dismiss). The Court of Appeals' exploration of literature, case law, and federal laws and regulations (A. 6a-8a) was designed to assure itself that the District's claim that its actions furthered the public health had a rational foundation. At trial, of course, the District retains the burden of proof to show that the claimed danger to the public is real; petitioners are responsible for the danger; and the harm is compensable. In short, the manufacturers' procedural rights remain fully intact.

4. No "Vested" Rights Are Affected by the Court of Appeals' Holding.

The petition's contention that the Court of Appeals' adherence to its own decades-old precedent deprived the manufacurers of "vested" rights (pet. at 19) is also frivolous.

a. This Court has held that protections afforded by statutes of limitations are not normally vested rights. *International Union of Electrical Workers v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976); *Chase Securities Corp. v.*

Donaldson, 325 U.S. 304, 313-316 (1945); *Campbell v. Holt*, 115 U.S. 620, 628-630 (1885).

b. Here, moreover, since at least 1970, in *Weis*, the Court of Appeals has held that the District was not subject to statutes of limitations when suing to protect the public health. *See* above, at 13. That decision was issued two years before enactment of D.C. Code § 12-310. Potential defendants were therefore on notice that D.C. Code § 12-310 might be construed as not applying to government litigation when the District was suing to vindicate public rights and that their ability to be free from suit might never "vest."

c. There is no basis for a doctrinal distinction between §§ 12-301 and -310 in the circumstances of this case, for reasons elaborated below. The statutes differ only by using different mechanisms for triggering the running of their time limits. In *Sandoe v. Lefta Associates*, 559 A.2d 732, 736 n. 5 (D.C. 1989), the Court of Appeals distinguished them by stating that time limits in § 12-301 are triggered by accrual of a cause of action while time limits in § 12-310 are triggered by events unrelated to the cause of action, such as completion of a building. The court called § 12-310 a "statute of repose." *Id.*

i. The Court of Appeals could reasonably hold that differences in the triggering mechanisms for starting the running of time do not determine whether government is to be subject to time limits when suing in the public interest. *See Bellevue School District v. Brazier Construction Co.*, 103 Wash. 2d 111, 691 P.2d 178, 183-84 (1984)(no reason to treat statutes of repose [such as § 12-310] differently from statutes of limitations in *nullum tempus* analysis); *Regents v. Hartford Accident & Indemnity Co.*, 21 Cal. 3d 624, 147 Cal. Rptr. 486, 495-96, 581 P.2d 197, 206-207 (1978)(no significant distinctions should be made between statutes of limitations and repose).

ii. Although the manufacturers assert that § 12-310 creates a "substantive" right, the "procedural"-"substantive"

dichotomy for time limits has been largely discounted in this Court's modern jurisprudence: "Except at the extremes, the terms 'substance' and 'procedure' precisely describe very little except a dichotomy, and what they mean is * * * largely determined by the purposes for which the dichotomy is drawn." *Sun Oil Co. v. Wortman, supra*, 486 U.S. at 726 (Full Faith and Credit and Due Process Clauses do not require forum state to apply other states' time limits); *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 516-518 (1953)(forum may treat "substantive" time limits of other states as "procedural"); *see also Beard v. J.I. Case Co.*, 823 F.2d 1095 (7th Cir. 1987)(refusing to apply expired Tennessee statute of repose in diversity suit brought in Wisconsin); *Wesley Theological Seminary v. U.S. Gypsum Co.*, 277 U.S. App. D.C. 360, 363-364, 876 F.2d 119, 122-123 (1989), *cert. denied*, 58 U.S.L.W. 3545, 108 L. Ed. 2d 473, 110 S. Ct. 1296 (1989) (upholding constitutionality of D.C. Law 6-202; distinction between statutes of limitations and statutes of repose is "somewhat metaphysical").

iii. In particular, there is no principled doctrinal basis for distinguishing time limits in statutes of repose from time limits in statutes of limitations when, as here, the government's cause of action actually accrued within the time limits of the statute of repose but the injury was first discovered after the time period had expired. Because asbestos is inherently dangerous, the District's cause of action against the manufacturers accrued as soon as their products were installed in government-owned buildings. In other words, the wrong was committed and the injury occurred upon installation, well within the ten-year time limit specified by D.C. Code § 12-310. The District did not sue at that time, however, because it had discovered neither the wrong nor its injury.[15]

---

[15] In the District of Columbia, the discovery rule normally tolls statutes of limitations until the wrong or injury is discovered. *Bussineau v. President, etc., of Georgetown College*, 518 A.2d 423, 425, 428 (D.C. 1986).

When injury occurs (and a cause of action accrues) within the limits set by a statute of repose but is discovered later, its time limits do not apply to the government. In *Oklahoma City Municipal Improvement Authority v. HBT, Inc., supra*, 769 P.2d at 131, the court held that the statute of repose did not apply to a municipal agency suing to recover damages caused by negligent design of part of a municipal water system. Noting that the design failure had occurred within the time limits of the statute of repose, the court wrote (*id.*, at 137):

> [S]ince plaintiffs' initial right of action accrued and vested within the prescribed time period, the statute governs in this case not the substantive issue of the existence of a right, but the procedural aspect of the availability of a remedy. Once a cause of action arises, applicable statutes of limitation begin to operate placing a limit on the plaintiff's availability of remedy. Since plaintiff[']s initial cause of action arose and vested during the ten year period prescribed by [the repose] law, public policy compels us to adhere to the general rule that public rights should not be prejudiced by the tardiness of officials to whom those rights are entrusted.

The government's immunity from time limits is designed to safeguard "public rights, revenues, and property from injury or loss, by the negligence of public officers." *Guaranty Trust Co. v. United States, supra*, 304 U.S. at 132, and *United States v. Hoar, supra*, 26 Fed. Cas. at 330. That purpose is furthered by the Court of Appeals' holding that the time limit in a statute of repose does not apply to the government, suing in the public's interest, when, as here, timely suit is thwarted only because information about a public health hazard has been deliberately and conspiratorially withheld from the government and the public.

CONCLUSION

The petition should be denied.

Respectfully submitted.

HERBERT O. REID, SR.,
Corporation Counsel

CHARLES L. REISCHEL,
Deputy Corporation Counsel,
Appellate Division

*LUTZ ALEXANDER PRAGER,
Assistant Deputy Corporation Counsel

Office of the Corporation Counsel
Room 305, District Building
Washington, D.C. 20004
Telephone: (202) 727-6252

**Counsel of Record*

AUGUST, 1990

No. 89-1890

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

OWENS-CORNING FIBERGLAS CORPORATION, GAF CORPORATION, THE CELOTEX CORPORATION, CAREY CANADA, INC., EAGLE-PICHER INDUSTRIES, INC., ARMSTRONG WORLD INDUSTRIES, INC., KEENE CORPORATION, FIBREBOARD CORPORATION, OWENS-ILLINOIS, INC., UNITED STATES GYPSUM COMPANY, W.R. GRACE & COMPANY, NATIONAL GYPSUM COMPANY, U.S. MINERAL PRODUCTS CO., PFIZER INC., GEORGIA PACIFIC CORPORATION, H.K. PORTER COMPANY, INC., SOUTHERN TEXTILE CORPORATION, THE FLINTKOTE COMPANY, PITTSBURGH CORNING CORPORATION, TURNER & NEWALL, PLC, ASBESTOS CORPORATION, LTD., and PROKO INDUSTRIES, INC.,

Petitioners,

—v.—

THE DISTRICT OF COLUMBIA, A MUNICIPAL CORPORATION,

Respondent.

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

PAUL A. ZEVNIK*
KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER
901 15th Street, N.W.
Washington, D.C. 20005
(202) 682-3500

Attorneys for Petitioners

* Counsel of Record

August 31, 1990

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1890

OWENS-CORNING FIBERGLAS CORPORATION, *et al.*

Petitioners,

—v.—

THE DISTRICT OF COLUMBIA, A MUNICIPAL CORPORATION,

Respondent.

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

Petitioners submit this reply in further support of their petition seeking this Court's review, on a writ of certiorari, of the decision of the District of Columbia Court of Appeals.

I. The District's Arguments Ignore the Circumstances Surrounding this Case and the Law in this Jurisdiction for More than a Century.

The underlying premise of the District of Columbia's opposition is that the evolution of the common law over the last century supports the lower court's sudden discovery of *nullum tempus* in the District of Columbia, which the panel erroneously denominates "municipal immunity." This portrayal, however, does not fairly depict the circumstances presented by this case. In December 1984, the District of Columbia brought an action for money damages based on alleged injury to real properties constructed in most cases several decades ago. After petitioners moved for summary judgment under the statute of repose and statute of

limitations—but before the trial court ruled—the District introduced and rushed through passage a piece of legislation creating *nullum tempus* immunity. D.C. Law 6-202. This *nullum tempus* legislation was properly struck down by the trial court as violative of due process and separation of powers. The trial court's rulings were certified for interlocutory appeal.

The central legal issue in this case was settled by this Court a century ago in *Metropolitan R.R. v. District of Columbia*, 132 U.S. 1 (1889). *Metropolitan Railroad* rejected the very arguments presented here.[1] The District now contends that this lawsuit fits within a supposed "gap" in *Metropolitan Railroad* and that *Metropolitan Railroad* reflects outmoded nineteenth century jurisprudence. These arguments ring hollow because *Metropolitan Railroad* has never been questioned by either the District or the Court of Appeals prior to this case. And, the District's felt need to enact legislation creating immunity from the statutes of limitations and repose—even before the trial court ruled on petitioners' motions—speaks for itself.

In short, although the District now wants this Court to perceive a gradual weathering of the common law eventually to expose the nugget of non-sovereign "municipal" immunity, all in order to save its $400 million private lawsuit, that is not what took place. For more than a century, the concept of a common law municipal immunity belonging to the District was neither raised nor discussed in this city, despite the so-called "evolution" of the common law, and despite the fact that the District has been a party to tens of thousands of lawsuits in the past hundred years. In the century between *Metropolitan Railroad* and this case, the District never relied

---

1 One of the treatises cited in *Metropolitan Railroad* recognized that a number of jurisdictions applied the *nullum tempus* doctrine to exempt municipalities from limitations statutes. 2 J.F. DILLON, LAW OF MUNICIPAL CORPORATIONS § 674 (1881) (cited at Resp. Br. at 8-9 & n.9). Moreover, in *Metropolitan Railroad*, the District presented this Court with the very same argument that it relies upon here, *viz.*, that the District should be exempt from the statute of limitations when it performs a "public function."

upon the *nullum tempus* doctrine and consistently filed suits within the limitations period.

Rather, the lower court invented a common law non-sovereign "municipal" immunity in order to attempt to get around *Metropolitan Railroad* while at the same time avoiding the myriad complexities and manifest infirmities posed by the District's attempted self-creation of sovereign immunities through D.C. Law 6-202. The lower court compounded this error by refusing to rest any part of its holding on, or address the impact of, 1973 "Home Rule" legislation.

The suggestion that the petition should be denied because no "significant federal interest" is raised by either the legal or factual predicates for the petition is meritless. The sudden creation by the lower court of a newly-discovered and non-existent common law immunity in order to avoid constitutional questions emphasizes the importance of granting the petition and issuing the writ.

II. *Metropolitan Railroad* and Article I, Section 8 of the Constitution Are Significant Federal Interests.

The District rests its opposition on three incorrect premises: (i) that *Metropolitan Railroad* left "gaps" capable of being "filled" by the District of Columbia's courts; (ii) that an "evolving common law" permits the District of Columbia Court of Appeals to modify this Court's decisions; and (iii) that "metaphysical attributes of sovereignty," including Article I, § 8, cl. 17 of the United States Constitution, are not relevant in determining the nature and extent of the District of Columbia's privileges and immunities.

i. As respects the issue decided by the Court of Appeals, there was no "gap" left by *Metropolitan Railroad*. This Court could not have been more explicit: *nullum tempus* is a prerogative of the sovereign, and, because the District of Columbia is not a sovereign, it does not enjoy the benefits of *nullum tempus*. Nor may the District of Columbia's courts create a power or immunity where none has been explicitly created by Congress. *E.g.*, *Maryland & Dist. of Columbia Rifle & Pistol Ass'n v. Washington*, 294 F. Supp. 1166, 1167

(D.D.C. 1967), *aff'd*, 142 U.S. App. D.C. 375 442 F.2d 123 (D.C. Cir. 1971).

ii. As respects the District, the notion that there is a "common law" of immunities such as *nullum tempus*, or that the law of "sovereignty" and "sovereign immunities" may be "adapted to changed conditions and time"—absent a constitutional amendment—is incorrect. The doctrine of *nullum tempus* was recognized in England as early as the 17th century as a prerogative solely of the Crown.[2] A prerogative, where it exists, is an appurtenance to sovereignty. *Aetna Casualty & Sur. Co. v. Bramwell*, 12 F.2d 307, 309 (D. Or. 1926). Under English law, the term "prerogative" "can *only* be applied to those rights and capacities which the king enjoys *alone*, in contradistinction to others, and not to those which he enjoys in common with any of his subjects." *Id.*, quoting 1 W. BLACKSTONE, COMMENTARIES 239 (1766) (emphasis added). As a result of the Revolution, the powers of Parliament and the prerogatives of the Crown devolved upon the people of the states, and these powers remain with the people of the states, *except to the extent that they have been delegated to the federal government. Fontain v. Ravenel*, 58 U.S. (17 How.) 369, 384 (1854); *Late Corp. of Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1 (1890). Under the Constitution, the sovereignty of the District has been passed to the federal government; accordingly, the prerogative of *nullum tempus* belongs to Congress, *not* to the District, as a matter of constitutional, not common, law. U.S. Const. art. I, § 8, cl. 17.

These "underpinnings" of *Metropolitan Railroad* remain unimpaired by the passage of time. *Guaranty Trust Co. v. United States*, 304 U.S. 126 (1938), states plainly that "[t]he rule nullum tempus has never been extended to agencies or grantees of the local sovereign such as *municipalities*, county boards, school districts and the like." 304 U.S. at 135 n.3

---

2 10 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 355 (1938).

(emphasis added).[3] *Guaranty Trust* further makes clear that *nullum tempus* immunity is applicable only to a sovereign. 304 U.S. at 133-34. Both the Court of Appeals and the District draw unwarranted comfort from an isolated and irrelevant passage of *Guaranty Trust* comparing monarchies with republican governments.[4]

iii. Under the Constitution, the District's sovereignty—or lack thereof—is scarcely "metaphysical." The Constitution carefully delimits the privileges and immunities of the federal government and its possessions, including the District of Columbia.[5] *See especially* U.S. Const. art. I, § 8, cl. 17. No decision of this Court since 1889 suggests that it views sovereignty or the doctrine of *nullum tempus* any differently, or, indeed, any differently than as expressed in *Metropolitan Railroad*. Neither *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907), nor *Guaranty Trust Co., supra*, stands for the proposition that *nullum tempus* is available to non-sovereign units of government in general or municipal corporations in particular. *Kawananakoa* is not a *nullum tempus* case at all, but concerns the applicability of immunity from suit to the territory of Hawaii,[6] and *Guaranty Trust* reaffirms the princi-

---

3 The issue in *Guaranty Trust* was "[w]hether the benefit of [*nullum tempus*] should be extended to a foreign sovereign suing in a state or federal court," a question which the Court answered in the negative. 304 U.S. at 133, 136.

4 In the passage relied upon by the Court of Appeals and the District, this Court simply noted that Justice Story's "reference to the public policy supporting the rule that limitation does not run against a domestic sovereign as 'equally applicable to all governments' was obviously designed to point out that the policy is as applicable to our own as to a monarchical form of government, and therefore is not to be discarded because of its former identity with royal prerogative." 304 U.S. at 134.

5 THE FEDERALIST NO. 39 (J. Madison).

6 That the District would even cite *Kawananakoa* is itself revealing, given that the Court of Appeals ultimately accepted the District's argument below that immunity from suit should be distinguished from *nullum tempus* immunity, and thus " 'entirely different considerations apply.' " App. 30a (*quoting* District's Reply Brief at 21). The Court of Appeals examined the

ple that *nullum tempus* is *not* available to non-sovereign entities.

Indeed, the District's discussion of *Kawananakoa* is doubly misleading. *Kawananakoa* affirmatively distinguishes the territory of Hawaii in 1907—which, as the District concedes, had been entrusted by Congress with a broad grant of legislative authority—from the District of Columbia in 1907. In contrasting Hawaii and the District, this Court permitted Hawaii—but not the District—to have limited immunity from tort liability, because Hawaii possessed legislative power. The distinction recognized by *Kawananakoa* is that in the District of Columbia "the body of private rights is created and controlled by Congress and not by a legislature of the District." 205 U.S. at 354. The Constitution itself commands that "Congress shall have Power . . . [t]o exercise exclusive Legislation in all Cases whatsoever over [the] District . . . ." U.S. Const. art. I, § 8, cl. 17. The District argues that it is saved by *Kawananakoa* because, since the enactment of "Home Rule" by Congress in 1973, "the District's legislative powers have closely resembled those of 1907 Hawaii." Resp. Br. at 12 n. 13. The flaw in this argument is that the Court of Appeals expressly declined to rest any part of its holding on the 1973 "Home Rule" legislation, App. 20a n. 25, recognizing, as it must, that sovereignty continues to be vested in Congress, not the District government. App. 22a.

In sum, the Court of Appeals did not provide any basis for deciding this case contrary to the principles set forth in *Metropolitan Railroad*, *Kawananakoa*, *Guaranty Trust*, and Article I, § 8, cl. 17. The writ should issue.

---

purposes of the two doctrines and concluded that cases concerning immunity from suit, including many of its own prior decisions, are inapposite. App. 29a-31a. Putting aside the inconsistency of the District's argument, the suggestion that "*Kawananakoa* [constitutes a] reformulation of the *nullum tempus* doctrine for non-sovereign entities," Resp. Br. at 12 n.13, stems from a fundamental misreading.

III. The Lower Court's Deprivation of Petitioners' Legal Defenses and Rights of Repose Without Due Process Also Warrants Review.

The Court of Appeals' finding, without discovery, trial or the opportunity to be heard, that petitioners' products "pose[ ] a pervasive and lethal threat to public safety" (App. 10a) does not merely result in this case going to trial; instead, it in effect deprives petitioners of the right to raise the statutes of limitations and repose as defenses.[7]

The Court of Appeals' determination that petitioners' products constitute a health hazard is anything but a "legal conclusion." The court strayed far from the record, basing its decision on highly controverted scientific studies that have little to do with the issues presented in this case. The Court of Appeals' reliance on these sources in its opinion demonstrate that the court's conclusion was based on factual, rather than legal, distinctions.[8] As such, petitioners have been deprived of a meaningful opportunity to confront adverse evidence. A court may not order the entry of judgment on an issue against a party without giving that party a chance to contest the facts material to the decision. *See Fountain v. Filson*, 336 U.S. 681 (1949).[9]

---

7 The Court of Appeals "conclude[d] that the District may bring an action for damages resulting from . . . contamination [by petitioners' products] even after the statutes of limitations and repose would ordinarily have run." App. 31a.

8 Respondent's reliance on Board of Educ. v. A, C & S, Inc., 131 Ill. 2d 428, 546 N.E.2d 580 (1989), is misplaced, as that case was before the court on defendants' motion to dismiss rather than on motion for summary judgment. Accordingly, plaintiff merely had to *plead* that defendants' products were harmful, rather than come forward with affirmative evidence. The opinion of an intermediate appellate court in Rowan County Bd. of Educ. v. United States Gypsum Co., 87 N.C. App. 106, 359 S.E.2d 814, *rev. denied*, 321 N.C. 298, 362 S.E.2d 782 (1987), represents the minority view regarding *nullum tempus*. Moreover, the North Carolina court was not bound by this Court's decision in *Metropolitan Railroad*.

9 In *Fountain*, this Court reversed a judgment of the United States Court of Appeals for the District of Columbia Circuit under circumstances

The Court of Appeals' ruling effectively removes petitioners' opportunity to contest whether their products pose a danger to public safety and, under the Court of Appeals' newly-fashioned standard of *nullum tempus* immunity, thereby defeats petitioners' ability to raise the statutes of limitations and repose as a bar. A right to an existing defense is a property right protected by the due process clause of the Fifth Amendment. *See Pritchard v. Norton*, 106 U.S. 124 (1882). The court below could have, and should have, avoided reaching decisions on disputed issues until the appellate record provided a basis for making such determinations.[10] Its failure to follow the required procedure of remanding the case to the lower court for further factual findings when the appellate record is insufficient merits, at minimum, reversal and remand.

As respects petitioners' due process claim relating to D.C. Code § 12-310, the difference between statutes of limitations and statutes of repose is anything but "metaphysical." The distinctions between the two types of statutes—and the rights afforded by them—are detailed in the petition at pp. 19-21 and have been recognized on numerous occasions by courts throughout the country, including the District of Columbia Court of Appeals. *Sandoe v. Lefta Assocs.*, 559 A.2d 732 (D.C. 1988); *President of Georgetown College v. Madden*,

---

similar to those presented here. The district court had granted summary judgment for defendant, but on review the Court of Appeals remanded the case to the trial court with instructions to enter judgment for plaintiff based on an issue on which defendant "had no opportunity to present a defense." 336 U.S. at 683. This Court reversed the Court of Appeals, holding that "it was error for it to deprive [defendant] of an opportunity to dispute the facts material to that claim by ordering summary judgment against her." *Id.*

10 The Court of Appeals' belated addition of a footnote cautioning the District that it may not rely on its opinion regarding the health hazards posed by petitioners' products at trial does not solve the problem, but instead underscores the court's error. Granting summary judgment in favor of the District on the basis of the "alleged" threat is improper unless there is no genuine issue of material fact in dispute. The added footnote calls attention to the fact that the court itself recognizes the existence of disputed issues of material fact with respect to the alleged hazards at issue in this case.

505 F. Supp. 557 (D. Md. 1980), *aff'd in part, dismissed in part*, 660 F.2d 91 (4th Cir. 1981); *Commonwealth v. Owens-Corning Fiberglas Corp.*, 238 Va. 595, 385 S.E.2d 865 (1989); *School Bd. v. United States Gypsum Co.*, 234 Va. 32, 360 S.E.2d 325 (1987); *First United Methodist Church v. United States Gypsum Co.*, 882 F.2d 862 (4th Cir. 1989), *cert. denied*, 110 S. Ct. 1113 (1990); *Goad v. Celotex Corp.*, 831 F.2d 508 (4th Cir. 1987), *cert. denied*, 487 U.S. 1218 (1988).[11]

This Court should grant review to correct the erroneous application of *nullum tempus* and the resulting derogation of petitioners' vested right to repose.

IV. There Is No Reason To Delay Review Until After Trial.

The District suggests that the writ should not issue because petitioners may proceed to trial, albeit *sans* defenses that could pertain to over eighty percent of the claimed damages. The decision below was a final determination of the questions presented in the petition. The disposition reached by the Court of Appeals effectively precludes further consideration of the limitations and repose issues until after substantial discovery and time-consuming and expensive proceedings. There is no reason to delay review. The lower court's decision satisfies this Court's approach to the question of "finality" for purposes of review under 28 U.S.C. § 1257, which permits this Court to review judgments of the District of Columbia Court of Appeals. *See Bradley v. School Bd.*, 416 U.S. 696, 722-23 (1974); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949) (the requirement of finality has been given a "practical rather than technical construction"); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477 (1975).

---

11 Sun Oil Co. v. Wortman, 486 U.S. 717 (1988), and Wells v. Simonds Abrasive Co., 345 U.S. 514 (1953), are inapposite. Both cases held that federal courts, sitting in diversity, could constitutionally apply their own statutes of limitations where the substantive law of another state applied. Neither case sheds any light on whether a court may abrogate the vested rights afforded by the statute of repose by application of the *nullum tempus* doctrine.

CONCLUSION

For the foregoing reasons, this Court should issue the requested writ of certiorari.

Respectfully submitted,

WILLIAM L. GARDNER
THOMAS J. O'BRIEN
MORGAN, LEWIS & BOCKIUS
1800 M Street, N.W.
Washington, D.C. 20036
(202) 467-7000

Counsel for United States Gypsum Company

PAUL A. ZEVNIK*
PETER C. CONDRON
KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
901 15th Street, N.W.
Washington, D.C. 20005
(202) 682-3500

Counsel for GAF Corporation

Of Counsel:

John F. Mahoney, Jr.
Mahoney, Hogan, Heffler & Heald
777 14th Street, N.W.
Suite 600
Washington, D.C. 20005
(202) 347-6161

Counsel for Owens-Corning Fiberglas Corporation

Drake C. Zaharris
Parks, Hansen & Ditch
Mercantile Towson Building
Suite 1012
409 Washington Avenue
Towson, Maryland 21204
(301) 821-6350

Counsel for The Celotex Corporation and Carey Canadian

Richard J. McMillan
Crowell & Moring
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2505
(202) 624-2500

Counsel for Eagle-Picher Industries

Kevin C. McCormick
Whiteford, Taylor & Preston
Suite 1400
Seven St. Paul Street
Baltimore, Maryland 21202
(301) 347-8700

Counsel for Armstrong World Industries

Quentin R. Corrie
Anderson & Quinn
Suite 370
12450 Fair Lakes Circle
Fairfax, Virginia 22033
(703) 222-2200

Counsel for Keene Corporation

John A. Sutherland, Jr.
Siciliano, Ellis, Dyer
& Boccarosse
10521 Judicial Drive
Suite 300
Fairfax, Virginia 22030
(703) 385-6692

Counsel for Fibreboard Corporation

Edward J. Lopata
Dwight D. Murray
Jordan, Coyne, Savits
& Lopata
1030 15th Street, N.W.
Washington, D.C. 20005
(202) 371-1800

Michael Quinn
Cahill Gordon & Reindel
1990 K Street, N.W.
Washington, D.C. 20006
(202) 862-8900

Counsel for W.R. Grace & Company

William Clague
Lennox Cooper
Bastian, Clague & Clancy
4701 Sangamore Road
Bethesda, Maryland 20816
(301) 320-5500

Counsel for U.S. Mineral Products Company

Thomas S. Schaufelberger
Drinker, Biddle & Reath
901 15th Street, N.W.
Washington, D.C. 20005
(202) 842-8800

Counsel for Georgia-Pacific Corporation

Steven D. Cundra
Rochelle Hindman
Thompson, Hine & Flory
1920 N Street, N.W.
Washington, D.C. 20036
(202) 331-8800

Counsel for The Flintkote Company

Timothy J. Bloomfield
Dunnells, Duval & Porter
2100 Pennsylvania Avenue
Washington, D.C. 20037
(202) 861-1400

Counsel for Pittsburgh-Corning Corporation

Charles E. Dorkey III
Thomas I. Sheridan III
Richards & O'Neil
885 Third Avenue
New York, New York 10022

Wyatt B. Durrette, Jr.
Bradley B. Cavedo
Durrette, Irvin & Lemons, P.C.
600 Main Street
Twentieth Floor
Richmond, Virginia 23219
(804) 780-0505

Counsel for Turner & Newall, PLC

John Calender
Kathryn Kusske
Clifford & Warnke
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 828-4248

Counsel for Owens-Illinois, Inc.

Arlene Fickler
Hoyle, Morris & Kerr
1424 Chestnut Street
Philadelphia, Pennsylvania 19102
(215) 981-5700

Counsel for National Gypsum Company

Charles R. Bruton
Rolin P. Bissell
Schnader, Harrison, Segal & Lewis
Suite 3600, 1600 Market Street
Philadelphia, Pennsylvania 19103
(215) 751-2686

Counsel for Pfizer Inc.

Charles E. Gallagher, Jr.
O'Malley, Miles & Harrell
99 Commerce Place
P.O. Box 900
Upper Marlboro, Maryland 20773
(301) 350-1300

Counsel for Asbestos Corporation Limited

Nancy E. Gregor
Gertrude C. Bartel
Kramon & Graham
Sun Life Building
Charles Center
Baltimore, Maryland 21201
(301) 752-6030

Counsel for H.K. Porter Company, Inc. and Southern Textile Corporation

Counsel for Petitioners

August 31, 1990

*Counsel of Record